

WHEN CRIME PAYS: “ENVIRONMENTAL CIVIL PROSECUTIONS” AND THE  
RESOURCE MANAGEMENT ACT 1991

---

A thesis submitted in fulfilment of the requirements for the degree of

Doctor of Philosophy

Mark James Francis Wright

University of Canterbury

2020

---

## Acknowledgements

---

I would first like to thank my supervisors – Professor John Hopkins, Professor Elizabeth Toomey and Professor Neil Boister – for their guidance and support. Professor Hopkins was the first person at the University of Canterbury that I mentioned my topic to and he has been with me ever since, reading everything from my first proposal to the final draft, always providing detailed and useful notes and assisting me in any way he could. It was also his idea to get Professor Toomey involved, and I have benefitted greatly from not only her thoughtful comments on my drafts, but also her positivity and direction. At their suggestion, Professor Boister joined the supervisory team once I was underway, and his ability to take a step back and provide critical insights into my work as a whole has helped me immensely. Overall, I have been extremely lucky to have three dedicated individuals involved who, despite all of their other commitments, always found the time to read my work, comment on it and answer any questions I had, and for that I am very grateful.

Thank you to the University of Canterbury and the New Zealand Law Foundation for their scholarships, which helped to ease the financial burden and allowed me to focus on my research, and were much appreciated. Thank you also to Professor Stepan Wood at the University of British Columbia, who sponsored me as a Visiting International Research Student when I spent a year in Vancouver as part of my studies.

My final thanks are saved for the people who are most important to me. My parents Rosemary and Murray instilled in me a desire to keep on learning, and my brother Matt has challenged me to be the best that I can. But it is my wife Nikki and my two sons Oscar and Albie that are my ultimate motivation. Thank you for your love and support, and for making me smile each time I came home from another day “writing chapters” (as my four-year-old puts it).

## Abstract

---

The Resource Management Act 1991 (**RMA**) is a significant piece of legislation, aimed at promoting the sustainable management of natural and physical resources in New Zealand.<sup>1</sup> However, it can only achieve this goal if it is properly enforced, and the most serious and visible means of doing this is by local authorities prosecuting those in breach of the Act's provisions. Yet the RMA's offences have, in and of themselves, received little attention, with previous research focussing on the effectiveness of the enforcement tools in the Act as a whole. Such an approach has also meant that the offences, when they are considered, are treated as though they are just another state regulatory tool, interchangeable with other mechanisms for securing compliance, as opposed to having the special significance that comes from employing the criminal law. There is also an underlying assumption in the previous research that any issues with enforcement can be solved, other than by minor tinkering with the tools, by altering the behaviour of the local authorities. Unsurprisingly, this is what the recent changes in the area of RMA enforcement have targeted.

This thesis seeks to fill the identified gaps in the literature by asking whether the offences in the Act are “working”. It does this by first considering whether the offences are effective – are they doing what they are supposed to? This involves determining the primary purpose of the offences, which is found to be deterrence, and then using deterrence theory to analyse the severity of the criminal sanctions and the certainty that they will be imposed. It then asks whether the offences are being used appropriately. This involves considering how the local authorities apply – or do not apply – the offences, and critiquing the approach councils are taking against criminal law theory.

The conclusion reached is that the offences are neither effective nor being used appropriately, and therefore they are not working. Fundamentally, this is because the offences, penalties and institutional arrangements for hearing prosecutions are formally criminal but in substance civil, with the confused system also meaning that the actions of local authorities are essentially unchecked. This thesis suggests that the way that serious non-compliance with the RMA is dealt with needs to be reconsidered, with the goals decided first and then the tools and institutional arrangements developed. In particular, if deterrence is to remain the primary goal, the question to be asked is what role – if any – the criminal law should play.

---

<sup>1</sup> Section 5(1).

# Table of Contents

---

|  |           |
|--|-----------|
| <b>Acknowledgements .....</b>  | <b>i</b>  |
| <b>Abstract.....</b>   | <b>ii</b> |
| <b>Chapter 1 – Introduction .....</b>  | <b>1</b>  |
| I The Research Question .....  | 1         |
| II Previous Findings .....   | 4         |
| III Methodology .....  | 9         |
| IV Outline.....  | 16        |
| <b>Chapter 2 – The Context for the Enquiry .....</b>                               | <b>20</b> |
| I Introduction.....  | 20        |
| II Regulation and the RMA .....  | 20        |
| III Reasons for, and Ways of, Regulating .....                                     | 23        |
| IV The RMA’s Offences, Penalties and Institutional Arrangements .....              | 31        |
| V Conclusion.....  | 34        |
| <b>Chapter 3 – Compliance and Enforcement, Sanctions and the Criminal Law.....</b> | <b>35</b> |
| I Introduction.....  | 35        |
| II Compliance.....   | 36        |
| A Levels of Compliance .....   | 37        |
| B Reasons for Compliance and Non-Compliance .....                                  | 39        |
| III Enforcement .....  | 41        |
| A Public versus Private Enforcement .....  | 43        |
| B Where and How to Intervene .....   | 44        |
| IV Sanctions .....   | 52        |
| A Deterrence Theory.....   | 54        |
| B Desert Theory .....  | 60        |
| V Using the Criminal Law .....   | 62        |

|  |            |
|--|------------|
| A Employment of the Criminal Law .....   | 65         |
| B Application of Offences .....  | 73         |
| VI Conclusion.....   | 76         |
| <b>Chapter 4 – Are the Offences Effective? .....</b>                                   | <b>79</b>  |
| I Introduction.....  | 79         |
| II Desert, Deterrence or Something Else? .....   | 79         |
| A Environment Judges Favour Deterrence .....   | 80         |
| B Local Authorities Agree .....  | 82         |
| III No More than Moderate Severity .....   | 85         |
| A Fines the Most Popular Sentence, but Only Modest Levels .....                        | 86         |
| B More Stringent Options are Rare .....  | 89         |
| 1 Alternative sentences for natural persons are infrequent.....                        | 89         |
| 2 Additional sentences are compliance-focussed, not punitive .....                     | 92         |
| C “Secondary” Penalties Provide Little Bolstering .....                                | 96         |
| 1 The formal consequences of a conviction are low.....                                 | 96         |
| 2 Informal penalties are variable.....   | 98         |
| IV Low Certainty of Imposition.....  | 101        |
| A Many Breaches are Missed .....   | 101        |
| B Detected Breaches are Rarely Prosecuted.....   | 106        |
| 1 Much informal enforcement action.....  | 106        |
| 2 Charges are brought infrequently (but usually successfully).....                     | 107        |
| V Conclusion.....  | 109        |
| <b>Chapter 5 – Explaining the Lack of Effectiveness: Constraints and Choices .....</b> | <b>111</b> |
| I Introduction.....  | 111        |
| II Why Low Certainty?.....   | 111        |
| A Local Authorities Prosecute Sparingly .....  | 112        |
| 1 Limited resources allocated to compliance, monitoring and enforcement .....          | 112        |

|   |            |
|---|------------|
| 2 Compliance approaches are adopted.....  | 113        |
| B The Public is Constrained from Increasing the Number of Prosecutions .....    | 124        |
| III Why No More than Moderate Severity? .....                                   | 125        |
| A The Courts are Constrained from Imposing Higher Fines .....                   | 126        |
| 1 Desert, not deterrence, to set starting points .....                          | 127        |
| 2 Many discounts, and few uplifts, to reach the end point .....                 | 134        |
| B Local Authorities Prefer Reparative Outcomes .....                            | 137        |
| 1 Fines provide compensation, other primary penalties are just punishment.....  | 137        |
| 2 Only cost comes from using convictions and leveraging prosecutions .....      | 144        |
| IV Conclusion.....  | 145        |
| <b>Chapter 6 – Are the Offences Being Used Appropriately? .....</b>             | <b>147</b> |
| I Introduction.....   | 147        |
| II Choosing What Types of Cases to Prosecute – No Harm No Foul .....            | 148        |
| A Outcomes .....  | 148        |
| B Problems.....   | 153        |
| C How Can This Happen? .....  | 155        |
| III Resolving Cases in Court – Plea Bargains by Deep Pockets .....              | 157        |
| A Outcomes .....  | 157        |
| B Problems.....   | 162        |
| C How Can This Happen? .....  | 166        |
| IV Resolving Cases Out of Court – Chequebook Justice.....                       | 167        |
| A Outcomes .....  | 168        |
| B Problems.....   | 172        |
| C How Can This Happen? .....  | 180        |
| V Conclusion.....   | 183        |
| <b>Chapter 7 – Explaining the Inappropriate Use: Form versus Substance.....</b> | <b>185</b> |
| I Introduction.....   | 185        |

|  |            |
|--|------------|
| II The Creation of the RMA – Towards Easier and More Worthwhile Prosecutions .....                                 | 186        |
| A Marked Variations in Previous Resource Management Legislation.....   | 186        |
| B Goals, but no Specifics, in the Resource Management Law Reform Project .....                                     | 190        |
| C “One Way Traffic” in the Resource Management Bill .....  | 194        |
| III The RMA’s Offences, Penalties and Institutional Arrangements – Few Indicators of Substantive Criminality ..... | 196        |
| A Offences .....   | 196        |
| 1 Casting the net widely.....  | 197        |
| 2 Limiting excuses .....   | 206        |
| B Penalties .....  | 208        |
| 1 A focus on insurable, compensatory monetary penalties.....   | 208        |
| 2 Convictions convey no adverse moral judgment .....   | 216        |
| C Institutional Arrangements .....   | 219        |
| 1 Prosecutions neither “private” nor “public” .....  | 219        |
| 2 In a “non-criminal” setting.....   | 223        |
| IV Conclusion.....   | 226        |
| <b>Chapter 8 – Conclusion .....</b>  | <b>228</b> |
| I Answering the Research Question .....  | 228        |
| II A Formally Criminal, but Substantively Civil, System.....   | 228        |
| III The Changes Underway and Proposed Will Miss the Mark .....   | 233        |
| IV A Way Forward.....  | 237        |
| <b>Bibliography .....</b>  | <b>241</b> |
| I Cases .....  | 241        |
| A New Zealand .....  | 241        |
| B Canada.....  | 247        |
| C European Union.....  | 247        |
| D United Kingdom.....  | 247        |

|  |     |
|--|-----|
| II Legislation .....                                 | 247 |
| A New Zealand .....                                  | 247 |
| 1 Statutes .....                                     | 247 |
| 2 Regulations .....                                  | 249 |
| 3 Bills .....  | 249 |
| B Australia .....                                    | 249 |
| C United Kingdom .....                               | 249 |
| III Books and Chapters in Books .....                | 249 |
| IV Journal Articles .....                            | 256 |
| V Parliamentary Debates .....                        | 266 |
| VI Central Government and Law Reform Materials ..... | 267 |
| A New Zealand .....                                  | 267 |
| B Australia .....                                    | 269 |
| C Canada .....                                       | 269 |
| D United Kingdom .....                               | 269 |
| VII Local Government Materials .....                 | 270 |
| VIII Official Information Requests .....             | 270 |
| IX Reports and Papers .....                          | 271 |
| X Speeches .....                                     | 272 |
| XI Newspaper Articles and Press Releases .....       | 273 |
| XII Other Resources .....                            | 274 |



## Chapter 1 – Introduction

---

### *I The Research Question*

On 16 May 2016, Judge Smith sentenced Mobil Oil New Zealand Ltd for the discharge of – “most likely” – 3,000 to 4,000 litres of Heavy Fuel Oil into Tauranga Harbour, in contravention of ss 338(1)(a) and 15(1)(a) of the Resource Management Act 1991 (**RMA**).<sup>1</sup> A “starting point” fine of \$360,000 was adopted, primarily based on the harm caused and the culpability of the defendant.<sup>2</sup> This was increased by one-third to take into account the wealth of the defendant, and then reduced by 20% for personal mitigating factors and a further 25% for an early guilty plea.<sup>3</sup> The end sentence was a conviction and a fine of \$288,000, which is one of the highest monetary penalties ever imposed under the RMA.<sup>4</sup> Yet the Judge concluded his decision by lamenting that the Regional Council’s “actual costs in relation to the prosecution...[had]... been over \$300,000 yet it only recovers 90 percent of the fine”,<sup>5</sup> and so:<sup>6</sup>

It appears to me that there may need to be some review of the legislation in due course to take into account that these costs are otherwise borne by the rate payers [sic] through no cause of their own.

Judge Smith’s comment was the genesis of this thesis. His Honour appeared to be suggesting that the penalty imposed on a defendant in a successful RMA prosecution should fully reimburse the local authority that initiated the matter, yet while the “polluter pays” principle is well-established in environmental law, compensation – and in particular to the prosecutor

---

<sup>1</sup> *Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd* [2016] NZDC 8903 at [16]. The writer was the junior prosecutor for the Bay of Plenty Regional Council.

<sup>2</sup> The “starting point” is “the sentence considered appropriate for the particular offending (the combination of features) for an adult offender after a defended trial”: *R v Mako* [2000] 2 NZLR 170 (CA) at [34].

<sup>3</sup> The personal mitigating factors included paying out direct costs of \$1.8 million to the Council and other parties to remediate the damage caused, and for committing “to a process with local iwi to try and address its relationship and take a role as a good corporate citizen within the Tauranga Moana”: *Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd*, above n 1, at [50]-[55].

<sup>4</sup> The only higher RMA fine was in *Maritime New Zealand v Daina Shipping Company* DC Tauranga CRI-2012-070-1872, 26 October 2012, where a fine of \$300,000 was imposed for a discharge arising out of (at [2]) “New Zealand’s worst maritime environmental disaster” and which involved (at Endnote ii) “hundreds of tonnes of oil” and “hundreds of containers and their contents, including dangerous goods” being discharged into the ocean, with the total cost to the Crown (as at October 2012) being approximately \$47 million. In *Manawatu-Wanganui Regional Council v Ruapehu Alpine Lifts Ltd* (2014) 18 ELRNZ 68 (DC) the defendant was fined a total of \$300,000 for a significant diesel spill into the Tongariro National Park, which contaminated a town water supply, but only \$240,000 of this was for the RMA charge (the rest being allocated to the charges under the Hazardous Substances and New Organisms Act 1996, with the defendant being convicted and discharged on the charge under the Health and Safety in Employment Act 1992).

<sup>5</sup> *Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd*, above n 1, at [59].

<sup>6</sup> At [60].

for its costs incurred in bringing a case – is not traditionally a priority of the courts when it comes to criminal sentencing.<sup>7</sup> Equally, it could have been said that the legislation should be reviewed because even a fine of \$288,000 would be unlikely to deter other members of the regulated community, given how rarely RMA prosecutions occur.<sup>8</sup> On the other hand, one could have argued that there is nothing wrong with the legislation, as it had enabled the imposition of a “deserved” sentence – that is, one that is proportionate to the seriousness of the offence committed and which takes into account aggravating and mitigating factors personal to the defendant.

Moving beyond the rationale for imposing sentences under the RMA, a wider examination of the Act’s offences and penalties, and the institutional arrangements for prosecuting, exposes additional issues for the criminal law. For instance, the offences are very broad, both in terms of the *actus rei* and the lack of any requirement that *mens rea* be proved, meaning that local authorities have great discretion as to who to charge and for what. Further, the penalties that can be imposed include both fines and imprisonment (which means that everything in between – supervision, intensive supervision, community work, community detention and home detention – are also options), yet sentencing almost always regresses to what dollar amount the offender should pay, with such amounts being insurable. The fact that guilty defendants receive a conviction appears almost irrelevant, except for those rare prosecutions where the defendant applies for a discharge without conviction, in which case both sides argue strongly why a conviction is, or is not, suddenly of such importance. When cases come to Court they are not classified as either private or public prosecutions, and local authorities are represented by a range of different advocates, including in-house counsel, barristers, “commercial” law firms and Crown Solicitors’ offices, with the type of representation (and who bears the cost of it) sometimes changing partway through the matter. Finally, cases are presided over by judges who spend most of their time in civil proceedings, and are managed accordingly.

---

<sup>7</sup> Although a local authority is defined in the RMA as a regional council or territorial authority (s 2(1)), because a territorial authority is defined in the Local Government Act 2002 as a city council or a district council named in Part 2 of Schedule 2 of that Act (s 5(1)), the terms local authority and council are used interchangeably in this thesis.

<sup>8</sup> In the 2015/2016 financial year, when this offending occurred, there were 57 prosecutions commenced, compared to 10,985 resource consent breaches and 31,446 complaints (an unknown number of which were substantiated) (Ministry for the Environment *National Monitoring System for 2015/16* (2017)), and, as will be discussed in Chapter 4, there would have been a large number of undetected breaches of the Act. The fine (in and of itself) would also have been unlikely to deter the defendant itself, given its parent entity had earned US\$16.2 billion in the previous year: see Bay of Plenty Regional Council “*Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd - Agreed Summary of Facts*” (2016) Bay of Plenty Regional Council <[www.boprc.govt.nz](http://www.boprc.govt.nz)> at [2].

This thesis undertakes the review sought by Judge Smith in *Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd*, but asks more generally: are the offences in the RMA working? There are two limbs to this enquiry – are the offences effective and are they being used by the local authorities appropriately – and it is argued, based on the following propositions that form the core of this thesis, that neither is being met:

1. In terms of the first limb (effectiveness), the primary reason for having the offences is commonly said to be deterrence, but it is unlikely that this goal is being achieved, as the penalties imposed pursuant to the offences are of no more than a moderate severity and there is a low certainty that a RMA breach will be met with a criminal response.<sup>9</sup> This lack of effectiveness can be explained by the constraints on both the courts and the public that are stopping these parties from increasing the severity and certainty of the penalties (respectively), and the choices made by local authorities to not in practice pursue deterrence, with councils preferring to use the offences sparingly and in a reparative manner (what is termed in this thesis the “reparative gloss”).<sup>10</sup>
2. In terms of the second limb (appropriateness), the reparative gloss is also resulting in local authorities acting, from a criminal law perspective, in a problematic manner, in terms of the types of cases they pursue, how they resolve cases in court and how they resolve cases out of court.<sup>11</sup> The inappropriate way that local authorities act can be explained by the relatively few indicators of substantive criminality present in the RMA’s offences, penalties and institutional arrangements – in essence, councils do not treat prosecutions as “criminal” because the offences, penalties and institutional arrangements are more akin to those associated with civil causes of action.<sup>12</sup>

The conclusion ultimately reached, therefore, is that the offences are not working. Stepping back, this thesis shows the consequences of employing the criminal law in a manner that goes far beyond dealing with only serious wrongdoing (in terms of harm and culpability). In particular, those enforcing it are – incorrectly – led to believe that minimum rule of law

---

<sup>9</sup> Chapter 4.

<sup>10</sup> Chapter 5.

<sup>11</sup> Chapter 6.

<sup>12</sup> Chapter 7. Hence the use of the term “environmental civil prosecutions” in the title of this thesis, which comes from a document prepared during the creation of the RMA (Ministry for the Environment *People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform* (December 1988) at 62). As will be seen, while never formally advanced for the RMA, environmental civil prosecutions have become the reality.

principles do not apply, and that they do not (actually) need to pursue well-established goals of criminal sanctioning.

This thesis recommends that the way that serious non-compliance with the RMA is dealt with is considered afresh, with the goals decided before the enforcement tools are developed. In particular, if deterrence is to remain the primary goal, the first question to be asked is whether the criminal law is required. If it is needed, then care must be taken to ensure that the offences, and their accompanying penalties and institutional arrangements, are sufficiently “criminal” – that is, in substance as well as form – to engender the respect of those applying them.

In the remainder of this chapter the terms of the enquiry are explained in more detail. Section II deals with the extent to which others have considered the question of whether the offences are working and where this research fits in. Section III sets out the approach taken in this thesis to answering the research question. Finally, section IV provides an outline of this thesis and a summary of the key findings.

## *II Previous Findings*

The RMA is a significant piece of legislation. It is New Zealand’s primary environmental regulation statute and was the culmination of a four-year law reform project that cost in excess of \$8 million.<sup>13</sup> The Act repealed 59 statutes, and amended many others, and when enacted it was nearly 400 pages long. It currently runs to a lot more than this, having frequently been altered, and not always in a coherent manner, to reflect the shifting ideologies of successive governments.<sup>14</sup> The “key themes” of the RMA are “the sustainable management of natural and physical resources, the integrated management of resources, and the control of the adverse effects of activities on the environment”.<sup>15</sup> However, it can only

---

<sup>13</sup> Geoffrey Palmer “The Resource Management Act - How we got it and what changes are being made to it” (address to the Resource Management Law Association, New Plymouth, 27 September 2013) at 6.

<sup>14</sup> For instance, in 2017 the National government (finally) passed the Resource Legislation Amendment Act 2017 after obtaining the support of the Māori party (see “RMA reforms back on track after National makes agreement with Maori Party” *New Zealand Herald* (online ed, Auckland, 23 March 2017)), but the National government was replaced by a Labour-led coalition government later that year, which has announced that it will repeal a number of these changes: see Hon David Parker MP “Two-step RMA reform to start by fixing the previous government's blunders” (press release, 9 November 2018); Resource Management Amendment Bill 2019 (180-1).

<sup>15</sup> Kenneth Palmer “Resource Management Act 1991” in Derek Nolan (ed) *Environmental and resource management law* (5th ed, LexisNexis, Wellington, 2015) at [3.12].

achieve such goals if it is properly enforced, and the most serious and visible means of doing this is by local authorities applying the Act's offences to those in breach of its provisions.

Yet little consideration has been given to whether the RMA's offences are working (let alone how to assess this), especially when compared to the rest of the Act which has been heavily researched. There are no books dedicated to RMA non-compliance and the general texts typically contain a single chapter (or part of a chapter), usually at the very end, that focusses on the key provisions and the leading cases on each.<sup>16</sup> Similarly, academic articles typically fall into two categories – either overviews of the offences (sometimes as part of a review of the enforcement mechanisms more generally)<sup>17</sup> or a more detailed consideration of one particular issue with prosecuting, such as jury trials<sup>18</sup> or sentencing.<sup>19</sup>

Official consideration of the offences has been similarly limited. The Ministry for the Environment, which is the government department responsible for the effective administration of the Act, has mainly considered the offences from a quantitative perspective, and this has been restricted to two things. First, the total number of prosecutions brought each year has been recorded since shortly after the RMA was enacted, initially in a series of yearly (and then two-yearly) local authority surveys,<sup>20</sup> and then as part of the National

---

<sup>16</sup> See, for instance, Ceri Warnock and Karenza de Silva "Compliance and Enforcement" in Peter Salmon and David Grinlinton (eds) *Environmental law in New Zealand* (Thomson Reuters, Wellington, 2015) and Janette Campbell "Statutory remedies: the enforcement provisions of the Resource Management Act 1991" in Derek Nolan (ed) *Environmental and resource management law* (5th ed, LexisNexis, Wellington, 2015). The former does, however, also contain a discussion at the start of the chapter on compliance theory and a section at the end on remaining issues and future developments.

<sup>17</sup> For example, David Grinlinton "Enforcement mechanisms under the RMA" (1992)(3) *Planning Quarterly* 13; Markus Milne "Is the Act Soft on Polluters" (1992) 15 *Terra Nova* 34; Martin Phillipson "Enforcement of environmental law: New Zealand's statutory model" (1995) 12(5) *Environmental and Planning Law Journal* 308; Richard Fisher "Prosecution of environmental offences under New Zealand's Resource Management Act 1991: troublesome policy issues for local government" (2005) 10 *Local Government Law Journal* 119; and Trevor Daya-Winterbottom "The prosecution of environmental offences in New Zealand" [2009] 5 *Environmental Liability* 177.

<sup>18</sup> For instance, Stephen Quinn "The unhappy marriage between RMA prosecutions and jury trials" (1998) 2(11) *Brookers Resource Management Bulletin* 123.

<sup>19</sup> For instance, David Grinlinton "Sentencing under the RMA" (2009) 8 *Brookers Resource Management Bulletin* 33.

<sup>20</sup> Ministry for the Environment *Resource Management Act Annual Survey of Local Authorities 1999/2000* (2001); Ministry for the Environment *Resource Management Act: Two-yearly Survey of Local Authorities 2001/2002* (2003); Ministry for the Environment *Resource Management Act: Two-yearly Survey of Local Authorities 2003/2004* (2005); Ministry for the Environment *Resource Management Act: Two-yearly Survey of Local Authorities 2005/2006* (2007); Ministry for the Environment *Resource Management Act: Two-yearly Survey of Local Authorities 2007/2008* (2009); Ministry for the Environment *Resource Management Act: Survey of Local Authorities 2010/2011* (2011) and Ministry for the Environment *Resource Management Act: Survey of Local Authorities 2012/2013* (2014).

Monitoring System.<sup>21</sup> However, neither the surveys nor the National Monitoring System record the number of defendants charged or the number of offences alleged in each of these prosecutions, or provide any follow-up in terms of the outcomes. Second, four studies into the use of prosecutions under the RMA have been undertaken, in 2002, 2006, 2009 and 2013.<sup>22</sup> These cover periods of between 3 and 10 years and record matters such as the total number of cases resolved, average fine levels and what non-monetary sentences were imposed. The prosecution studies accordingly provide more (and different) information than the local authority surveys and the National Monitoring System, but they have minimal commentary as to what the outcomes they record mean in terms of the goals of enforcement, and it would appear that there is no intention to publish any further such studies.<sup>23</sup>

One can only speculate as to why the question of whether the offences are working has received such little attention. However, it is suggested that it may be because people that write generally about the RMA are, first and foremost, interested in environmental law (in a narrow sense of whether a certain activity is good or bad for the environment), and they see the offences as solely a part of the criminal law. On the other hand, those interested in the criminal law may not see the offences in the RMA as “criminal in any real sense”,<sup>24</sup> and therefore have little interest in their operation. This uncertainty is perhaps best summed up in the “Message from the Minister” in the Ministry for the Environment’s 2018 Best Practice Guidelines for Compliance, Monitoring and Enforcement under the Resource Management Act 1991, where he notes that “[e]nforcement of the rule of law will always be essential to encourage broader compliance. *This is true in criminal, transport, taxation, or environmental law*”.<sup>25</sup>

---

<sup>21</sup> The three years of data that have been used are Ministry for the Environment *National Monitoring System for 2014/15* (2016); Ministry for the Environment, above n 8; Ministry for the Environment *National Monitoring System for 2016/17* (2018).

<sup>22</sup> Ministry for the Environment *A study into the use of prosecutions under the Resource Management Act 1991: 1 October 1991 - 30 June 2001* (May 2002); Ministry for the Environment *A study into the use of prosecutions under the Resource Management Act 1991: 1 July 2001 - 30 April 2005* (February 2006); Ministry for the Environment *A study into the use of prosecutions under the Resource Management Act 1991: 1 May 2005 - 30 June 2008* (March 2009); Ministry for the Environment *A study into the use of prosecutions under the Resource Management Act 1991: 1 July 2008 - 30 September 2012* (October 2013).

<sup>23</sup> Marie Brown *Last Line of Defence: Compliance, monitoring and enforcement of New Zealand's environmental law* (Environmental Defence Society, Auckland, 2017) at 53.

<sup>24</sup> To borrow the phrase from *Sherras v De Rutzen* [1895] 1 QB 918 at 922.

<sup>25</sup> Ministry for the Environment *Best Practice Guidelines for Compliance, Monitoring and Enforcement under the Resource Management Act 1991* (2018) at 7 (emphasis added). See also the view expressed in Matthew Palmer “Impressions of Life and Law on the High Court Bench” (2018) 49(3) *Victoria University of Wellington Law Review* 297 that (at 309) “overspecialisation in some areas of the profession – the tax bar and resource management bar spring to mind – has had negative effects on the understanding of law in those fields”.

Whatever the reason, it is no surprise that any consideration of whether the offences are working has been undertaken under the more general banner of compliance, monitoring and enforcement by local authorities. This arguably began with the Auditor-General's 2011 report on challenges for regional councils in managing freshwater quality, which raised concerns about variable practice between councils when using the enforcement provisions and the involvement of councillors in specific prosecution decisions, but its scope was limited both in terms of the local authorities involved and the subject matter considered.<sup>26</sup> More recently, there was a 2016 Ministry for the Environment report on compliance, monitoring and enforcement by local authorities under the RMA and a 2017 Environmental Defence Society report on compliance, monitoring and enforcement of New Zealand's environmental laws (one section of which was on the RMA).<sup>27</sup> These reports, which are discussed in detail throughout this thesis, reviewed the approaches taken by local authorities nationwide and over every activity covered by the Act, and highlighted, among other things, limited resourcing of compliance, monitoring and enforcement, inconsistent enforcement practices throughout the country and a lack of data.<sup>28</sup>

These reports are important, but they leave two gaps and share a critical assumption. Looking first at the gaps, one is that the reports have not isolated, in any meaningful way, the impact of the offences. This means that there is no way of knowing whether the offences, in and of themselves, are effective. This is significant because the offences, with the accompanying conviction and maximum fine of \$600,000 for non-natural persons and \$300,000 for natural persons (or imprisonment of up to two years),<sup>29</sup> are of an entirely

---

<sup>26</sup> Office of the Auditor-General *Managing freshwater quality: Challenges for regional councils* (September 2011) at 59-68. The only report that predates this is Warren Adler *The state of the compliance and enforcement regime under the Resource Management Act 1991* (Strategik Group, 2008), which was commissioned by the Ministry for the Environment but is not available on its website; rather, it was provided under the Official Information Act 1982.

<sup>27</sup> Ministry for the Environment *Compliance, monitoring and enforcement by local authorities under the Resource Management Act 1991* (2016); Brown, above n 23. RMA enforcement was also considered, in the context of regulatory enforcement generally, in New Zealand Productivity Commission *Towards better local regulation* (May 2013) at ch 10.

<sup>28</sup> Most recently, the Compliance and Enforcement Special Interest Group, made up of the Regional Councils and Unitary Authorities, commissioned a report on compliance monitoring and enforcement in the regional sector (Marie Brown *Independent Analysis of the 2017/2018 Compliance Monitoring and Enforcement Metrics for the Regional Sector* (The Catalyst Group, 2018)), which identified key areas for improvement as including minimising (or explaining) variations in practice, resourcing levels and data collection. The author of this report was the same person who wrote the Environmental Defence Society's 2017 report.

<sup>29</sup> RMA, s 339(1).

different magnitude to the other sanctioning option available in the RMA, the infringement offence, for which no conviction is entered and the maximum fee payable is only \$1,000.<sup>30</sup>

The other gap is that, because the reports focus on the enforcement mechanisms generally, they do not consider whether the offences are being used appropriately. Indeed, there is typically no acknowledgement at all of the social significance that comes with employing the criminal law, the offences instead being treated as “just another state regulatory tool”, interchangeable with the other mechanisms.<sup>31</sup> This is important because if, in the application of the offences, the rights of the regulated community are being disregarded or the interests of the wider public are being jeopardised, then the offences would not be working even if they were effective.

In terms of the critical assumption, the reports proceed on the basis that the enforcement tools (including the offences) in the RMA are suitable, with the focus being on how they are used. Indeed, it has been said that the “range of tools available under the RMA rivals those of any other environmental legislation and can be viewed as an exemplar in this respect”.<sup>32</sup> This means that the options considered as to how to improve enforcement is naturally limited to implementation. However, if it is the design of the offences, penalties and institutional arrangements that is driving implementation, then simply trying to change how the offences are applied, worthwhile as this is, is unlikely to have any real and long-lasting effect.

This thesis fills the gaps identified above by specifically considering not only whether the RMA’s offences are effective, but also the appropriateness of the approach taken by local authorities.<sup>33</sup> Further, this thesis moves one step further and challenges the critical assumption that there is no issue with the enforcement tools, and in particular the offences, penalties and the institutional arrangements for hearing prosecutions, considering whether it

---

<sup>30</sup> It has been proposed that the maximum fee be increased to \$2,000 for natural persons and \$4,000 for non-natural persons: see Cabinet Paper *Proposed Resource Management Amendment Bill: Stage 1 of a resource management system review* (2018) at [64]-[65]; Resource Management Amendment Bill 2019 (180-1).

<sup>31</sup> The “just another state regulatory tool” conception of the criminal law is referred to in AP Simester and Andreas Von Hirsch *Crimes, harms, and wrongs: on the principles of criminalisation* (Hart Publishing, Oxford, 2011) at 4. As Simester and Von Hirsch go on to note, in disagreeing with this conception (at 19, their emphasis):

... the criminal law is distinctive because of its moral voice. It removes specified activities from the permissible and punishes individuals who venture or stray into its realm. It is a complex, authoritative, censuring device. Conduct is deemed through its criminalisation to be, and is subsequently punished as, *wrongful* behaviour that warrants blame.

<sup>32</sup> Brown, above n 23, at 39.

<sup>33</sup> In some ways this is similar to the approach taken by Yeung, in which she assesses the effectiveness of the enforcement of Australian competition law and how well it is consistent with “constitutional values”: Karen Yeung *Securing compliance: a principled approach* (Hart Publishing, Oxford, 2004) at ch 3.



is the drafting (and interpretation) of these that is responsible for the behaviour of the local authorities. If so, then this research has implications for the work that has recently taken place, and is currently underway, to improve enforcement, which focusses on implementation.<sup>34</sup>

### *III Methodology*

The research process was in three phases, which broadly align with the two gaps and one critical assumption referred to above. The first matter considered was the outcomes from the offences, which corresponds to their effectiveness. After this, the reasons for these outcomes was considered, with a focus on whether the approach taken by local authorities is appropriate. Third, the question was asked whether it was the offences, penalties and institutional arrangements for hearing prosecutions that is driving the approach taken by councils. In this section, each of these three phases is discussed in more detail, with the data that has been used, and the limitations with it, set out. It can be observed that the first phase was mainly a quantitative enquiry, so the data from this phase (and its limitations) is described in some detail here, whereas the second and third phases were more qualitative in nature, and so it is more convenient to discuss the specifics of the data, and any issues with it, while undertaking the substantive analysis.

As just stated, the initial phase of the research was directed at the outcomes from the offences. This would allow a determination to be made as to whether the offences are effective – that is, are they doing what they are supposed to – which is the first limb of the enquiry into whether the offences are “working”. However, as noted in the opening paragraphs of this chapter, different views can be taken as to the primary purpose of imposing penalties pursuant to the RMA’s offences, and the preliminary task was therefore to determine the (stated) rationale for sentencing and prosecuting RMA cases. This involved reviewing court decisions (as to the former) and local authority enforcement policies and national guidance (as to the latter), and deterrence was identified as the (stated) primary purpose of sentencing and prosecution. A decision was then made to use deterrence theory to assess whether the offences are effective, which meant considering the severity of the penalties imposed pursuant to the offences and the certainty that such a penalty will be

---

<sup>34</sup> In terms of the work that has taken place, see Ministry for the Environment, above n 25; in terms of the work that is currently underway, see Cabinet Paper, above n 30 and the Resource Management Amendment Bill 2019 (180-1).

imposed, in order to gauge the expected cost of the offences (that is, whether they are a good or a bad deterrent).

In terms of the severity of the offences, data was used from (primarily) three sources. The first source was the four studies into the use of prosecutions under the RMA that were referred to in the section above, which were published by the Ministry for the Environment and covered the period from 1 October 1991 to 30 September 2012. As previously noted, these recorded (among other things) the highest, lowest and average fines awarded, both by charge and by prosecution. The studies also recorded the number of cases where non-monetary and other penalties were imposed.

Given the last prosecution study was published in 2013, it was necessary to obtain more recent data, and the second and third sources cover the period after the last prosecution study ended (30 September 2012) to 30 June 2017.<sup>35</sup> The second source was information provided by the Ministry of Justice, pursuant to a request under the Official Information Act 1982, on the number of RMA charges filed and resolved and the number of persons/organisations who faced RMA charges during this time period.<sup>36</sup> This data was provided in aggregate form for each of the financial years 2012/2013 to 2016/2017. The Ministry also provided data on how many of each type of sentence was imposed, the average length of the non-monetary sentences and the average size of the monetary sentences.

The third source was RMA sentencing decisions issued during the 1 October 2012 to 30 June 2017 time period, which were obtained from Westlaw, LexisNexis and NZLII databases.<sup>37</sup> The searches that were undertaken identified 224 first instance full-text sentencing decisions and 18 appeals against sentence. From these, decisions issued during the 2016/2017 financial year were chosen as a case study. Specific analysis was undertaken of the 39 sentencing decisions available for this time period, which involved entering each of the cases on a separate row of a Microsoft Excel spreadsheet and calculating (among other things) the average fine per prosecution and per defendant. Any other sentences imposed were also

---

<sup>35</sup> 30 June 2017 was chosen as the cut-off date for all quantitative data, as it was the last full financial year of data available as at 31 December 2018 (the financial year runs from 1 July to 30 June).

<sup>36</sup> Letter from Ministry of Justice to Mark Wright regarding Official Information Act 1982 request (23 February 2018).

<sup>37</sup> The searches conducted were: “Resource Management Act (legislation), Criminal Justice > Sentencing (classification)”; “Resource Management Act (legislation), District (court), Sentencing (free text)”; “District (court), Sentencing (free text), Resource Management > Offences and Penalties (classification)”; “District (court), Sentencing and ‘Resource Management Act’ (free text)”; and “Resource Management > Regulation > Prosecutions (classification)”. These were recorded in a Microsoft Excel spreadsheet, arranged by date and by prosecutor.

recorded, along with matters such as the relationship between the various defendants, the section of the Act that the charges were brought under, the purpose(s) of sentencing noted by the Judge (if any) and the culpability of the defendant (as found by the Judge).

Each of the data sources has limitations. Starting with the prosecution studies, in the first three of these only a selection of local authorities were contacted to supply data (in addition to the data obtained from a Thomson Reuters case law database), and the survey periods are of different lengths.<sup>38</sup> Even the final study does not contain all the prosecutions for the period, and subjective decisions were made in each as to when defendants were related (for instance, whether they were parent and subsidiary companies) and so should be counted, for the purpose of calculating average fines, together as one prosecution.<sup>39</sup>

The Ministry of Justice data is presented quite differently to the prosecution studies, focussing on charge or offender, rather than prosecution, which makes comparisons difficult. Further, some outcomes are listed as “Not proved”, which includes not only acquittals and where charges are dismissed, but also where charges are withdrawn by the prosecutor,<sup>40</sup> despite these outcomes often arising for quite different reasons. For instance, an acquittal means that the prosecution has not proved the charge to the required standard, whereas a withdrawn charge may occur as part of a plea bargain, whereby the defendant has agreed to plead guilty to one or more charges in return for one or more other charges not being pursued. As such, “Not proved” outcomes may in fact reflect that the local authority has been successful on other charges.

Finally, the analysis of the 39 sentencing decisions for the 2016/2017 financial year represents only approximately 75% of the defendants sentenced, given that there were 59 defendants in the decisions considered and the Ministry of Justice data records that 76 defendants had charges “proven” against them during the year.<sup>41</sup> Judgment calls had to be made as to whether certain sentencing decisions formed part of a single prosecution or were separate, the latter often occurring when a number of people were charged together but some pleaded guilty while others were found guilty at trial. In these circumstances, each

---

<sup>38</sup> These limitations are noted in the fourth study: Ministry for the Environment, above n 22, at 11-12.

<sup>39</sup> At 11.

<sup>40</sup> Ministry of Justice, above n 36, at Appendix 1.

<sup>41</sup> At Appendix 1.

sentencing decision was treated as a prosecution, as it generally meant that the defendants were not related parties.<sup>42</sup>

To assess the certainty that a penalty will be imposed, data was used from (primarily) four sources. The first source was the local authority surveys (referred to in the section above) published by the Ministry for the Environment between 1995 and 2013, which recorded, among other things, matters such as the number of RMA complaints and the number of prosecutions initiated. Second, as also referred to above, since 2014 the Ministry has been collecting information for a National Monitoring System and, at the time of writing, had published three years' worth of data.<sup>43</sup> This includes similar data to that obtained in the local authority surveys, but is more comprehensive and attributes the data to individual local authorities and specific sections of the RMA breached. Third and fourth, the prosecution studies and Ministry of Justice data referred to in the previous paragraphs also provide relevant information for the periods 1991 to 2012 and 2012 to 2017 (respectively). The prosecution studies record the number of RMA prosecutions that were successful (that is, resulted in a penalty being imposed), and the Ministry of Justice data records the number of RMA charges that were resolved (that is, "Convicted, "Not proved" or "Other proved")<sup>44</sup> and the number of offenders that had charges against them resolved.<sup>45</sup>

As with the prosecution studies and the Ministry of Justice data, the local authority surveys and National Monitoring System data have drawbacks. For instance, the Ministry for the Environment is reliant on the local authorities providing accurate information, yet there are errors, gaps in what has been provided and differences in interpretation of the questions. In terms of errors, in 2015/2016 Selwyn District Council was listed in the National Monitoring System as having 4,950 consents requiring monitoring and having been monitored, with non-compliance left blank. This would mean that it (a district council) had the third highest number of consents that required monitoring, behind only Auckland Council (a unitary authority) and Environment Canterbury (a regional council), and would be a significant

---

<sup>42</sup> As discussed in subsequent chapters, where the defendants are "one and the same for practical fiscal purposes...the total penalty imposed must be tailored accordingly" (*Kiwi Drilling Company Ltd v R* (1997) 4 ELRNZ 23 (CA) at 28), which typically means dividing the one penalty between them (see, for example, *Hardegger v Southland Regional Council* [2017] NZHC 469).

<sup>43</sup> The Ministry has since published a fourth year of data – Ministry for the Environment *National Monitoring System for 2017/18* (2019) – but this is not included in the analysis in this thesis as it was after the cut-off date for quantitative data of 31 December 2018.

<sup>44</sup> "Other proved" means "Youth Court proved, Discharge without conviction and Adult diversion/Youth Court discharge": Ministry of Justice, above n 36, at Appendix 1. The definition of "Not proved" is referred to above.

<sup>45</sup> The issue with comparing prosecutions (as recorded in the prosecution studies) and charges and offenders (as recorded in the Ministry of Justice data) has been referred to above.

increase on the 664 consents it had that required monitoring in 2014/2015 (of which 844 were monitored) and the 596 consents that required monitoring in 2016/2017 (of which 589 were monitored). In terms of gaps in the data, one example is that Gisborne District Council is recorded as having no resource consents requiring monitoring, no resource consents monitored and no resource consent non-compliance in the 2015/2016 National Monitoring System. This is despite the fact that in 2014/2015 it had 1,287 resource consents requiring monitoring (and monitored) and 70 instances of resource consent non-compliance, and in 2016/2017 it had 238 resource consents requiring monitoring, with 214 monitored and resource consent non-compliance left blank.<sup>46</sup> In terms of differences in interpretation, the Otago Regional Council is recorded as having prosecuted 16 times in the 2014/2015 National Monitoring System, but a Local Government and Official Information and Meetings Act 1987 request made of that council revealed that it in fact only initiated 10 prosecutions that year, 16 being the number of defendants charged.<sup>47</sup>

Further, the questions asked of councils have sometimes changed from year to year (likely in response to difficulties in providing the information sought and issues with interpretation), meaning comparisons over time are difficult. For example, in the early years of the local authorities' surveys councils were asked – without further elaboration – the number of RMA complaints they received. However, by 1999/2000 it became apparent that there was confusion amongst local authorities as to whether they should be including the number of excessive noise complaints in their responses.<sup>48</sup> These make up a significant portion of RMA complaints and would therefore have a major impact on the figures given.<sup>49</sup> From this point on it became explicit that excessive noise complaints were to be recorded (and recorded separately so these could be included/excluded from analysis where required), but it is not known how many local authorities were, and were not, including such complaints in their survey responses before 1999/2000.

Despite the limitations with the sources, there was sufficient data to enable an assessment, at a national level, of the severity of the penalties and the certainty that they will be imposed. This is for two reasons. One is that there were enough sources to corroborate – or otherwise

---

<sup>46</sup> Further, the Gisborne District Council *2015/16 Annual Report* (2016) notes (at 42-43) that monitoring of resource consents was required and undertaken during the 2015/16 year.

<sup>47</sup> Letter from Otago Regional Council to Mark Wright regarding Local Government Official Information and Meetings Act 1987 (LGOIMA) Request (24 July 2019).

<sup>48</sup> Ministry for the Environment, above n 20, at 32.

<sup>49</sup> For instance, there were 130,540 excessive noise complaints recorded in the 2016/2017 National Monitoring System.

– any questionable figures that arose. For instance, the Marlborough District Council was recorded in the National Monitoring System as having initiated 12 prosecutions in 2014/15, which, with the second highest number of prosecutions that year behind Otago Regional Council’s 16 (which, as noted above, should have been 10), seemed very high for a council that otherwise prosecuted infrequently.<sup>50</sup> It was possible to check the Marlborough District Council’s Annual Report for 2014/15, which recorded that there were in fact 12 charges laid, rather than prosecutions initiated.<sup>51</sup> The other reason is that the purpose of assessing the severity and certainty of the offences is not to come up with an exact figure representing the expected cost of the offences. Rather, the point is simply to get an indication of whether the offences are, at a national level, a good or a bad deterrent. Having dealt with any major issues with the data, it was possible to do this.

The second phase of the research was about explaining why the offences are – or as it transpired are not – effective, and whether the way that the offences are being used by local authorities is appropriate from a criminal law perspective. The focus on local authorities was because it became apparent when considering the effectiveness of the offences that, while there are three parties that can affect the severity and certainty of the offences – the courts, the public and the local authorities – it is only the councils that have any real choice in this regard. On the other hand, the courts and the public are constrained, both formally by the relevant legislation and functionally by the actions of councils, from significantly changing the effectiveness of the offences (other than incrementally).

As such, once the constraints on the courts and public had been explained, attention turned to the reasons that local authorities apply the offences in the way they do. In order to determine this, the approach taken by Hawkins in his 2002 book *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* was followed.<sup>52</sup> He had noted, in his study of decision-making in the health and safety field, that by “employing different methods, and drawing from a variety of sources of data, problems arising from the elusiveness of decision-

---

<sup>50</sup> For instance, the Marlborough District Council did not prosecute in 2015/2016 and prosecuted six times in 2016/2017.

<sup>51</sup> Marlborough District Council *Annual Report* (2014/15) at 98. At most, it would seem that there were 3 prosecutions initiated, although given these were against related parties this could equally be counted as one prosecution: see Marlborough District Council *Minutes of a Meeting of the Environment Committee* (3 September 2015), which records (at 7) that during the 2014/2015 year there was “a significant prosecution against PJ Woolley, SM Woolley and Awarua Farm (Marlborough) Limited (In Receivership) resulting in 16 convictions being entered.” The citation for the sentencing decision is *Marlborough District Council v Woolley* [2015] NZDC 16110.

<sup>52</sup> Keith Hawkins *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (Oxford University Press, Oxford, 2002).

making can be mitigated to an extent.”<sup>53</sup> Accordingly, a wide range of sources was used, including local government policies and reports on enforcement, information requests of councils, studies of local authority enforcement behaviour (as part of which enforcement officers and other council officials had been interviewed) and case law.

At the completion of the second phase of the project the questions of whether or not the offences are effective (and why this was) and whether local authorities are, or are not, using the offences appropriately had been answered. The third phase was then about whether there is a systemic explanation for the actions of the local authorities – is there something in the legislation that is driving the (inappropriate and ineffective) behaviour of local authorities? If so, then this should be the first area targeted in any reforms, rather than focussing on implementation (as has been the case to date).

As noted in the opening paragraphs of this chapter, the Act’s offences, penalties and institutional arrangements for prosecuting contain some unusual features, so the first task was to understand the rationale behind the drafting and organisation of these. To do this, the resource management legislation before the RMA, the Resource Management Law Reform project (which led to the formation of the Act) and the passage of the Resource Management Bill through Parliament were reviewed. After this, the specific drafting of the Act’s offences and penalties (and how they have been interpreted by the courts), and the ramifications of the institutional arrangements for hearing prosecutions, were considered against criminal law theory.

It will be apparent from this section that this thesis is about looking beneath the formal nature of the offences, penalties and institutional arrangements, and the rhetoric from the local authorities, to what is really happening in RMA prosecutions. Often, there are only indications that a certain course is being followed, and it has been necessary to make generalisations. However, it is suggested that Stuntz’s comments from his 2011 book entitled *The collapse of American criminal justice* are applicable here:<sup>54</sup>

It’s always tempting to look for the car keys under the streetlight— but in this instance, the best insights lie in the less well-lit spaces of the more distant past. Better to draw unconfident conclusions based on incomplete evidence than to ignore the past that has shaped the criminal justice present.

---

<sup>53</sup> At 450.

<sup>54</sup> William J Stuntz *The collapse of American criminal justice* (Harvard University Press, Cambridge, 2011) at 10 (citations omitted).

#### *IV Outline*

This thesis is set out as follows. Chapter 2 provides the context for this enquiry. It begins with the RMA in general, observing that it is a regulatory statute that was enacted to correct for the presence of externalities. It then notes that the Act regulates in a command and control manner, with the “controls” split between directive (abatement notices and enforcement orders) and punitive (infringement notices and offences) options. Finally, the RMA’s offences, penalties and institutional arrangements for hearing prosecutions, which are the subject of this thesis, are described.

The context chapter identifies three overlapping theoretical areas that the RMA’s offences fit into – regulatory compliance and enforcement, the imposition of sanctions (as penalties are commonly called in regulatory matters) and the use of the criminal law – and these are the topic of Chapter 3. The chapter begins by noting that regulatory compliance and enforcement theory suggests that people comply (and do not comply) with rules for different reasons, and that this must be recognised in an enforcement strategy. It then goes through the various approaches that have been developed to bring about compliance, observing that in all of these sanctions have a role to play. The focus then shifts to the different reasons why a sanction might be imposed. In regulatory matters, deterrence is typically preferred, with theory suggesting that people will be deterred where the expected cost of offending outweighs the expected benefit of doing so. The expected cost of an offence is what a Government/regulator can influence, and this is a function of the severity of the penalties imposed pursuant to the offence and the certainty that such a penalty will be imposed.

On the other hand, criminal law scholars typically prefer desert theory, which suggests that penalties should be proportionate to the gravity of the offence committed. The chapter concludes by examining, more generally, the use of the criminal law to deal with regulatory breaches. The observation is made that the criminal law is not automatically inappropriate for such breaches, as these can be sufficiently wrong, harmful and committed culpably, but the manner in which offences in regulatory statutes are drafted is often overbroad. This also has implications for the application of the offences, as the wider these are drafted the more discretion enforcers will have, and the greater the risk that they will be used inappropriately.

The theoretical chapter reveals that there is a marked difference between regulatory compliance and enforcement theory, which focusses on how regulators can best secure conformity with the rules of a regime, and criminal law theory, which focusses on the rights



of those subject to offences (that is, in the context of regulation, the regulatees). There is, therefore, a tension when it comes to using criminal offences in regulatory statutes, and chapters 4 through 7, the core of this thesis, are fundamentally about whether this tension has been resolved in the RMA – are the offences effective and are they being used appropriately, such that they can be said to be working? Chapters 4 and 5 focus on the question of whether the offences are effective, first answering the question (Chapter 4) and then explaining why (Chapter 5). Chapters 6 and 7 focus on the question of whether the offences are being used appropriately, again first answering the question (Chapter 6) and then explaining why (Chapter 7).

Chapter 4 begins by identifying that deterrence is the (stated) primary purpose of the RMA's offences. Effectiveness can therefore be assessed by gauging the expected cost of the penalties imposed pursuant to the offences, on the basis that the greater the expected cost the more of a deterrent (and so effective) the offences will be (and vice versa). In terms of severity, the usual penalty imposed is a modest fine (sometimes accompanied by an enforcement order aimed at securing compliance with the Act), with more punitive options rarely used and convictions and informal penalties doing little to bolster the "primary" sanction. This means that, overall, the severity of the penalties is no more than moderate. In terms of certainty, there is a low chance that a breach of the RMA will result in a criminal penalty, as many breaches are not detected, where a breach is detected formal enforcement action often does not follow, and if it does follow then it is rarely prosecution. Given certainty is generally considered the more important of the two factors, this means that the offences appear to have a minimal expected cost, and so it would only take a correspondingly low expected benefit from breaching the RMA for a rational regulatee to offend. Accordingly, the offences would seem to be a relatively poor deterrent, and as such ineffective.

Why are criminal penalties only moderate and so rarely imposed? This is the subject of Chapter 5. The question is considered from the perspective of the three parties that can influence the expected cost of the offences – local authorities (which can affect both the certainty that a penalty will be imposed and the severity of the penalty), the public (which can affect certainty only) and the courts (which can affect severity only). It transpires that it is a combination of constraints on the courts and the public, and choices made by local authorities, that is restricting the deterrent effect of the penalties. In terms of those whose actions are constrained, the courts follow orthodox, desert-based, sentencing practice, which

has restricted fine levels due to the uncertainties around culpability, the low base point from which sentences started and the number of discounts that Judges feel obliged to give off the starting point. Similarly, the public does not, practically, have the means to increase the number of prosecutions or pressure local authorities to prosecute more. On the other hand, local authorities have choices in terms of both certainty and severity, and they have decided to adopt compliance approaches to enforcement, which means they use the RMA's offences sparingly, and when they do prosecute they typically seek reparative, as opposed to purely punitive, outcomes.

This combination of local authorities prosecuting sparingly and, when they do prosecute, seeking reparative outcomes can be termed the "reparative gloss", and Chapter 6 asks whether this way of using the offences is appropriate (from a criminal law perspective). The reparative gloss has resulted in councils rarely taking section 9 prosecutions (and favouring section 12 to 15 prosecutions), entering into plea bargains with defendants to ensure that cases are resolved by non-natural persons pleading guilty (and agreeing on the summary of facts), and resolving cases out of court when they can achieve the same, if not better, outcomes as they would have achieved in a prosecution. For each outcome, it is suggested that the way local authorities are acting is, at times, inappropriate, yet such actions have been allowed to happen due to a lack of checks and accountability.

Chapter 7 finishes the critique of the RMA's offences by looking at why local authorities consider it acceptable to treat the offences in this (ineffective and, at times, inappropriate) way. The chapter starts by considering the situation before the RMA and it finds that the goals of the Resource Management Law Reform project (which preceded the drafting of the Act), as it related to the offences, were to make prosecuting easier and more worthwhile. However, there was a lack of specificity as to how to do this and only limited attention was given to the trade-offs that would be involved in advancing such goals. This task was left to the government, which ended up grafting the offences on to a highly developed front-end and going far beyond the criminal law paradigm in doing so. The offences are very broad, in terms of who can be prosecuted and for what, with the prosecution not needing to prove any mental element and the defendant only being able to escape liability if it can meet the restrictive statutory defences (that it must notify the prosecutor it is relying on). Further, the focus of the penalties is on insurable fines that are returned to the party bringing the charges, with imprisonment and other non-monetary penalties used rarely and convictions typically said to not have any moral force. Finally, RMA cases fit into neither of the usual categories

of “private” or “public” prosecutions, local authorities can instruct (and must pay for) whoever they like to act for them, and cases are managed by judges that do no other criminal work. Taken altogether, the offences and prosecutions are criminal in name only, and more akin to civil causes of actions and proceedings, meaning it is no surprise that local authorities apply them inappropriately (from a criminal law perspective).

Chapter 8 concludes. The offences are not working, as they are neither effective nor being used by the local authorities appropriately. Stepping back, it can be observed that the fundamental problem is that the offences, along with the penalties and institutional arrangements for hearing prosecutions, are formally criminal but in substance civil. The civil substance has led local authorities to act inappropriately and ineffectively, while the formal criminality has prevented the courts and the public from stopping or solving these problems. The confused system has led to a lack of accountability, with the Solicitor-General having no oversight and the Ministry for the Environment doing little to monitor the actions of local authorities. Such findings are important because the work to date, and recent changes, all focus on the behaviour of the local authorities, when attention instead needs to be on the offences, penalties and institutional arrangements for hearing prosecutions. The thesis finishes by suggesting that it is unlikely the current system can be fixed, and that the way serious non-compliance is dealt with needs to be reconsidered. The goals must first be decided and then the tools and institutional arrangements developed. In particular, if deterrence is to remain the primary goal, the question to be asked is what role – if any – the criminal law should play.

## Chapter 2 – The Context for the Enquiry

---

### *I Introduction*

Having set out the terms of the enquiry, this chapter provides the context in which it takes place. It was noted, in Chapter 1, that the RMA is New Zealand's primary environmental regulation statute, but what is meant by the term regulation, and in particular environmental regulation? This is the topic of section II. After reviewing different ways of defining the term regulation, it is observed that a relatively narrow characterisation (broadly, rules created by government and enforced by a public agency) is most appropriate for present purposes. On the other hand, because the RMA includes not only laws relating to how humans interact with the environment, but also natural resource planning, management and development, a more expanded definition of environmental regulation than that which is often adopted internationally is used.

Section III then moves on to consider why the Government enacted the RMA and the way in which the Act regulates. It is noted that the RMA was enacted primarily for economic, market failure, reasons, with the aim of forcing the internalisation of costs that are being imposed on others (externalities). To do this, the Act regulates in a “command and control” manner, with a series of duties and restrictions set out in Part 3 (commands) and both directive and punitive responses to non-compliance available (controls), one of which is criminal offences. The chapter concludes, in section IV, with a brief overview of the RMA's offences, penalties and institutional arrangements for hearing prosecutions.

### *II Regulation and the RMA*

A common starting point for defining the term regulation is Selznick's “sustained and focused control exercised by a public agency over activities that are valued by a community.”<sup>1</sup> While, for reasons that will be discussed in the next paragraph, this definition is now considered to be “highly problematic”,<sup>2</sup> it provides some useful indicators as to what is traditionally meant by the term regulation.<sup>3</sup> For instance, sustained and focused control

---

<sup>1</sup> Philip Selznick “Focusing Organisational Research on Regulation” in Roger Noll (ed) *Regulatory Policy and the Social Sciences* (University of California Press, Berkley, 1985) at 363.

<sup>2</sup> Robert Baldwin, Martin Cave and Martin Lodge “Introduction: Regulation - The Field and the Developing Agenda” in Robert Baldwin, Martin Cave, and Martin Lodge (eds) *The Oxford Handbook of Regulation* (Oxford University Press, New York, 2010) at 12.

<sup>3</sup> Indeed, it was only ever expressed by Selznick to be the “central” meaning: see Selznick, above n 1, at 363.

suggests that regulation is something that happens on purpose, rather than occurring unintentionally. Further, the reference to the control being exercised by a public agency presupposes that it is the state that is regulating. Finally, because the activities being regulated are “valued”, the goal is not necessarily to stop the behaviour (although this will sometimes be necessary), but rather to modify it to accord with collective goals.<sup>4</sup> This qualification also makes it clear that the subject matter is different to that found in the traditional areas of criminal law and the criminal justice system, where the government is still controlling but it is over non-valued activities (for example, intentional harmful acts to other persons).<sup>5</sup>

In more recent years, issues have been identified with Selznick’s definition of regulation. Perhaps the greatest concern has been the realisation that it is not just the government that is “regulating” behaviour – third parties have an influence and businesses themselves have a role to play, and indeed can often perform the task more efficiently than governments.<sup>6</sup> However, another concern has been that regulation may not be happening intentionally, but rather could be occurring as a side effect of pursuing other objectives.<sup>7</sup> This has led to the word regulation being given a number of meanings in modern usage, with Black noting that the main textbooks contain three types of definition of regulation: a narrow definition of rules created by government and enforced by a public agency, a wider definition retaining government as the regulator but expanding the techniques to any form of direct state intervention in the economy, and the widest being “all mechanisms of social control or influence affecting behaviour from whatever source, whether intentional or not.”<sup>8</sup>

For this thesis, it is not necessary to go far beyond the narrowest definition. Part 3 of the RMA, which is discussed below, contains a set of overarching rules created by the state, and these are enforced by public agencies (broadly speaking) using the tools provided in Part 12 of the Act (which is also discussed below). However, there are two ways in which the RMA

---

<sup>4</sup> Karen Yeung *Securing compliance: a principled approach* (Hart Publishing, Oxford, 2004) at 6.

<sup>5</sup> Anthony Ogus *Regulation: legal form and economic theory* (Clarendon Press, Oxford, 1994) at 1. But see Nicola Lacey “Criminalization as Regulation” in Christine Parker and others (eds) *Regulating Law* (Oxford University Press, Oxford, 2004) at 144.

<sup>6</sup> See generally Neil Gunningham, Peter Grabosky and Darren Sinclair *Smart regulation: designing environmental policy* (Clarendon Press, Oxford, 1998).

<sup>7</sup> Robert Baldwin, Martin Cave and Martin Lodge *Understanding Regulation* (2nd ed, Oxford University Press, New York, 2011) at 3.

<sup>8</sup> Julia Black “Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a ‘Post-Regulatory’ World” (2001) 54(1) *Current Legal Problems* 103 at 129, citing Robert Baldwin, Colin Scott and Christopher Hood *A Reader on Regulation* (Oxford University Press, Oxford, 1998) at 3 and Robert Baldwin and Martin Cave *Understanding Regulation* (1st ed, Oxford University Press, New York, 1999) at 2.

moves past the narrowest definition. First, in terms of the rules, what is specifically prohibited (and allowed) can be modified, subject to certain limits, by local authorities using their district or regional plans (as the case may be) and the granting of resource consents.<sup>9</sup> Second, in terms of enforcement (and indeed implementation more generally), this has been devolved to councils, rather being undertaken by a central government agency.<sup>10</sup>

The specific roles of central and local government (and within local government) are outlined in Part 4 of the Act. Central government's role, among other things, is to set overall guidance, by way of national policy statements, national environmental standards and national planning standards,<sup>11</sup> and to monitor the effect and implementation of the RMA, the relationship between the functions, powers, and duties of central government and local government under this Part, and any matter of environmental significance.<sup>12</sup> In terms of implementation by local government, responsibilities have been divided between regional councils and territorial authorities (with unitary authorities undertaking both).<sup>13</sup> Regional councils are responsible for soil conservation, water quantity and quality, air quality, the coastal marine area, land use to avoid natural hazards, and investigating and monitoring contaminated land.<sup>14</sup> Territorial authorities are responsible for land use, noise, subdivision, and the effects of activities on the surface of rivers and lakes.<sup>15</sup>

The manner in which central and local government make the various standards, policies and plans, and councils undertake the resource consent process, is set out in Parts 5 and 6 of the Act (respectively). In particular, Part 5 contains what has been described as:<sup>16</sup>

a cascade of planning documents, each intended, ultimately, to give effect to s 5, and to Part 2 more generally. These documents form an integral part of the legislative framework of the RMA and give substance to its purpose by identifying objectives, policies, methods and rules with increasing particularity both as to substantive content and locality.

---

<sup>9</sup> It can also be modified by the executive, using national environmental standards, but these are not the focus of this thesis.

<sup>10</sup> Although it can be observed that the Government has recently taken steps to increase the involvement of the Environment Protection Authority, a central government agency, in RMA enforcement: see Hon David Parker MP "Resource Management Act oversight unit to be established" (press release, 17 May 2018); Resource Management Amendment Bill 2019 (180-1).

<sup>11</sup> Section 24(a)-(ba).

<sup>12</sup> Section 24(f)-(ga).

<sup>13</sup> A unitary authority is defined in s 5(1) of the Local Government Act 2002 as a territorial authority that has the responsibilities, duties, and powers of a regional council conferred on it under the provisions of any Act or an Order in Council giving effect to a reorganisation plan.

<sup>14</sup> Section 30.

<sup>15</sup> Section 31.

<sup>16</sup> *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [30].

The reference to s 5 in this quote is to the purpose of the RMA, but before moving on to consider this as part of the reasons for regulating, it is necessary to explain what is meant by the term *environmental* regulation. This is one aspect of environmental law, and is typically placed in the category of “social” regulation (as opposed to “economic” regulation) in that it “does not have overt economic objectives but does have economic effects, costs, and benefits”.<sup>17</sup> Originally, environmental law was concerned with the “protection, conservation and preservation of flora and fauna, and common property resources such as land, water, and air, where these natural resources have been threatened by human activity”.<sup>18</sup> Separate to this were laws relating to natural resource planning, management, and development.<sup>19</sup> The RMA, however, integrated environmental protection and resource development, and therefore in this thesis the terms “environmental law” and “environmental regulation” refer to both categories. It is important to note that this may not be the case overseas, and so references to “environmental law” and “environmental regulation” in international literature need to be treated with some caution in the New Zealand context. In particular, they may only be referring to environmental protection and, in some circumstances, only to the even narrower subject of pollution control.<sup>20</sup>

### *III Reasons for, and Ways of, Regulating*

There are both economic and (what could be termed) “ethical”<sup>21</sup> reasons for regulating in the environmental context.<sup>22</sup> The latter includes anthropocentric theories – for instance, that we should regulate “not only in order to protect human health, but also to protect nature because of its instrumental value to humans in providing drugs, food, recreation, spiritual and other beliefs” – as well as theories that involve protecting the environment for animals or for all

---

<sup>17</sup> Cento Veljanovski “Economic Approaches to Regulation” in Robert Baldwin, Martin Cave, and Martin Lodge (eds) *The Oxford Handbook of Regulation* (Oxford University Press, New York, 2010) at 18.

<sup>18</sup> Kenneth Palmer “Introduction to environmental law” in Derek Nolan (ed) *Environmental and resource management law* (5th ed, LexisNexis, Wellington, 2015) at [1.2].

<sup>19</sup> At 1.2. For a history of town planning in New Zealand, see New Zealand Productivity Commission *A history of town planning: Research note* (2015).

<sup>20</sup> For instance, although not explicit, the Law Reform Commission of Canada’s study paper on sentencing in environmental cases seems to use the words “environmental” and “pollution” interchangeably: John Swaigen and Gail Bunt *Sentencing in Environmental Cases* (Law Reform Commission of Canada, Ottawa, 1985).

<sup>21</sup> Chris Hilson *Regulating Pollution: A UK and EC Perspective* (Hart Publishing, Oxford, 2000) at 3-5.

<sup>22</sup> The discussion here is concerned with what Baldwin, Cave and Lodge would refer to as “technical justifications”, as opposed to motives, for regulating. For a discussion on the latter, which includes public interest theories, interest group theories and institutional theories, see Baldwin, Cave and Lodge, above n 7, at ch 4.

living organisms.<sup>23</sup> More common, however, are economic reasons, with the main justification for regulating being that there has been market failure which, together with private law failure, suggests a *prima facie* case for regulatory intervention in the public interest.<sup>24</sup>

There are a number of reasons that markets fail, but in the environmental field the “failure” is generally attributed to what are known as externalities.<sup>25</sup> These occur when the production of goods or services imposes costs on third parties that are not reflected in the price charged.<sup>26</sup> There may, of course, be private solutions available to affected parties to deal with the effects of externalities, but such solutions bring with them their own issues. For instance, diffuse discharges of contaminants may make it difficult to identify a specific victim, and even where there is an identifiable victim, the high transaction costs involved may mean that it is not practical for every affected person to bring civil proceedings against the party at fault.<sup>27</sup> This, therefore, generally leads to regulation to require the internalisation of these costs that are being imposed on others, which is known as the “polluter pays” principle.<sup>28</sup>

The economic, market failure, rationale is adopted by the RMA. Indeed, the Act is a classic example of regulating due to the presence of externalities,<sup>29</sup> with the “polluter pays” principle being prominent in many decisions relating to the enforcement of the Act’s provisions.<sup>30</sup> This is also made clear by the purpose of the Act in s 5, which is “to promote the sustainable management of natural and physical resources”,<sup>31</sup> with “sustainable management” defined in subs (2) to mean:<sup>32</sup>

---

<sup>23</sup> Hilson, above n 21, at 3-5. See generally Sean Coyle and Karen Morrow *The Philosophical Foundations of Environmental Law* (Hart Publishing, Portland, 2004).

<sup>24</sup> Ogus, above n 5, at 30; Richard Posner *Economic analysis of law* (7th ed, Wolters Kluwer, Austin, 2007) at 389; Genevra Richardson, Anthony Ogus and Paul Burrows *Policing Pollution: A Study of Regulation and Enforcement* (Clarendon Press, Oxford, 1982) at 5; Ronald Coase “The Problem of Social Cost” (1960) 3 *The Journal of Law & Economics* 1 at 18-19. As Ogus notes, it is only a *prima facie* case because the regulatory solution may be no more successful.

<sup>25</sup> For an overview of market failure rationales, see Baldwin, Cave and Lodge, above n 7, at ch 2.

<sup>26</sup> Ogus, above n 5, at 35.

<sup>27</sup> See generally Roger Bowles, Michael Faure and Nuno Garoupa “The Scope of Criminal Law and Criminal Sanctions: An Economic View and Policy Implications” (2008) 35(3) *Journal of Law and Society* 389.

<sup>28</sup> Baldwin, Cave and Lodge, above n 7, at 18.

<sup>29</sup> Michael Pickford “The ‘Environmental Bottom Line’ and Economic Efficiency” (2014) 20 *Canterbury Law Review* 39 at 41; P Ali Memon *Keeping New Zealand Green: Recent Environmental Reforms* (University of Otago Press, Dunedin, 1993) at 96. See also the speech of Hon Simon Upton, Minister for the Environment, on the third reading of the Resource Management Bill (4 July 1991) 516 NZPD 3019.

<sup>30</sup> See, for example, *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 (HC) at 502.

<sup>31</sup> RMA, s 5(1). It can be observed that the term “sustainable management” was chosen, instead of the more well-known term “sustainable development” that had been popularised by the Brundtland Report (as to which, see generally Constance Hunt, Peter Bobeff and Kenneth Palmer “Legal Issues arising from the Principle of



... managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—

- (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
- (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

How is sustainable management to be achieved? Theory suggests that any legislation designed to control interdependencies that generate externalities must define the policy targets for the reduction of those costs, nominate the precise form of regulatory instrument, establish the enforcement mechanism and provide ‘just’ compensation to those who suffer the consequences of the externality.<sup>33</sup> For instance, Baldwin, Cave and Lodge note that:<sup>34</sup>

If the state wants to control, say, the pollution of a river, it may approach the issue in a number of ways. It may decide to regulate the pollution directly by means of a government department or agency; it may rely on the polluting firms to self-regulate (perhaps under state oversight); or it might delegate the control function to third parties such as public interest groups and the commercial partners of the polluters.

This thesis is concerned with the first of these approaches – direct state intervention – as it is the primary means of regulating chosen for the RMA. There are various ways a state can regulate directly, but in the environmental field the two main approaches are “command and control” and the use of economic instruments.<sup>35</sup> The latter will be dealt with only briefly. Economic instruments seek to influence behaviour by, for example, rewarding those that meet targets and taxing those that do not. During the deregulation period of the late 1980s

---

Sustainable Development: Australia, Canada and New Zealand” (1991) 1 *Journal of Energy and Natural Resources Law* 1), because the latter term was thought to embrace “a very wide scope of matters including social inequities and global redistribution of wealth”, and that it is “inappropriate for legislation of this kind to include such goals”: see *Report of the Review Group on the Resource Management Bill* (11 February 1991) at 6.

<sup>32</sup> The purpose is supported by three principles in ss 6, 7 and 8 of the Act. For a discussion of the purpose and principles of the Act, see *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*, above n 16, and *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.

<sup>33</sup> Richardson, Ogus and Burrows, above n 24, at 11. However, as they go on to note (at 12-13), the extent to which this is followed in practice is uncertain, and the fourth factor in particular – providing just compensation – is not often a feature of pollution control legislation. Yet as will be seen in chapters 5, 6 and 7 of this thesis, compensation to local authorities is made available by the RMA, and indeed is considered very important by councils.

<sup>34</sup> Baldwin, Cave and Lodge, above n 7, at 105.

<sup>35</sup> The former is much more common: see Nathaniel Keohane, Richard Revesz and Robert Stavins “The Choice of Regulatory Instruments in Environmental Policy” (1998) 22 *Harvard Environmental Law Review* 313 for a discussion as to the possible reasons for this.

and early 1990s there was an increase in their use, as they were considered to be more efficient than command and control regulation.<sup>36</sup> Indeed, the RMA provided the legislative framework for their introduction,<sup>37</sup> albeit in a limited way.<sup>38</sup> However, whether due to the limited nature of the economic instruments or for other reasons, there was little uptake of these either in the years following the RMA's enactment,<sup>39</sup> or more recently,<sup>40</sup> and they are not considered any further in this thesis.

Command and control regulation involves the use of government-imposed rules ("commands") backed by negative sanctions ("controls"). In terms of "commands", these can be found in legislation, regulations or rules (or a combination of these). There are a number of different ways the "command" can be drafted, but a typical approach is to either create an absolute prohibition or use a standard that must be met.<sup>41</sup> Further, the command may be coupled with a prior approval mechanism – for instance, the activity is only prohibited or the standard must only be met if the regulatee has not previously been given permission to breach it by way of a licence.<sup>42</sup> In terms of "controls", the traditional approach has been to make the breach of a command a criminal offence,<sup>43</sup> although regulators have long held the power to apply compliance measures and incapacitation mechanisms,<sup>44</sup> and alternative (that is, non-criminal) sanctions are becoming increasingly popular.<sup>45</sup>

There are a number of benefits of command and control regulation. Perhaps the greatest strength of it is that "the force of the law can be used to impose fixed standards with

---

<sup>36</sup> Neil Gunningham "Environment Law, Regulation and Governance: Shifting Architectures" (2009) 21(2) *Journal of Environmental Law* 179 at 185.

<sup>37</sup> Benjamin Richardson "Economic Instruments and Sustainable Management in New Zealand" (1998) 10(1) *Journal of Environmental Law* 21 at 21.

<sup>38</sup> Ton Buhrs and Robert V Bartlett *Environmental policy in New Zealand: the politics of clean and green?* (Oxford University Press, Auckland, 1993) at 107.

<sup>39</sup> At 28.

<sup>40</sup> Kenneth Palmer "Resource Management Act 1991" in Derek Nolan (ed) *Environmental and resource management law* (5th ed, LexisNexis, Wellington, 2015) at [3.102]. However, the New Zealand Productivity Commission has recommended that a future urban planning system (which would replace the RMA) should involve a greater use of economic and market-based instruments: see New Zealand Productivity Commission *Better urban planning: Final report* (2017) at 6 and 15.

<sup>41</sup> Examples of the latter include specification standards (for example, the plant must be designed to certain standards), performance standards (for example, the plant must be run to certain standards) or outcome standards (for example, the emissions from the plant must meet certain standards): see Baldwin, Cave and Lodge, above n 7, at 296-298.

<sup>42</sup> Carolyn Abbot *Enforcing Pollution Control Regulation* (Hart Publishing, Portland, 2009) at 4.

<sup>43</sup> Robert Baldwin "Regulation: After 'Command and Control'" in Keith Hawkins (ed) *The Human Face of Law: Essays in Honour of Donald Harris* (Clarendon Press, Oxford, 1997) at 65.

<sup>44</sup> It is typically also a criminal offence if you fail to comply with such measures and mechanisms.

<sup>45</sup> See generally Law Commission *Civil Pecuniary Penalties* (NZLC IP33, 2012); Law Commission *Pecuniary Penalties: guidance for legislative design* (NZLC R133, 2014).

immediacy and to prohibit activity not conforming to such standards.”<sup>46</sup> Further, the public feels protected and a message is sent to the regulated community that breaching the rules is not appropriate behaviour.<sup>47</sup> Finally, it is a form of regulation that is familiar to those making the law and those enforcing it, and the concept, if not the rules, is generally well understood by those subject to it. Put another way, the regulated community know there are rules and that there will be consequences for not following them, although they may not know what those rules, or the consequences, are, or when those consequences will be applied.

However, there are various criticisms of command and control regulation. For instance, it requires regulators to have knowledge of industry that may not be possible, it does not encourage firms to go beyond minimum standards, it is costly and difficult to enforce, it is vulnerable to political manipulation and it can lead to increasing administrative complexity and a proliferation of hard law.<sup>48</sup> However, it has also been argued that the criticisms of it are often “seriously overstated”,<sup>49</sup> and that “‘command and control’ is more a caricature than an accurate description of the operation of any particularly regulatory system”, with the “extent to which it does or does not live up to its caricature [being] an empirical question”.<sup>50</sup>

The offences, penalties and institutional arrangements this thesis critiques fit squarely within command and control regulation. Part 3 of the Act sets out the duties and restrictions imposed on regulatees (the “commands”). These relate to land, subdivision, the coastal marine area, the beds of certain rivers and lakes, water and discharges of contaminants.<sup>51</sup> For some of these duties and restrictions, such as the use of land, the starting point is that the use is permitted unless it contravenes a national environmental standard, a regional rule or a district rule. Further, even if the use is in contravention of a standard or rule (as the case may be), it will still be permitted if expressly allowed by a resource consent or an existing use. For other duties and restrictions, such as the discharge of contaminants, the position is reversed – the activity is *prima facie* prohibited and only permitted if expressly allowed by a

---

<sup>46</sup> Baldwin, above n 43, at 66.

<sup>47</sup> At 66. This can be contrasted with economic instruments, the message they send being that the activity is acceptable so long as the regulatee pays for the social cost they cause.

<sup>48</sup> Gunningham, Grabosky and Sinclair, above n 6, at 44-46.

<sup>49</sup> Gunningham, above n 36, at 183.

<sup>50</sup> Black, above n 8, at 105-106. See also Darren Sinclair “Self-Regulation Versus Command and Control? Beyond False Dichotomies” 19(4) *Law & Policy* 529. Further, a number of these criticisms could, equally, be levelled at alternative means of regulating: see Baldwin, above n 43, at 80. Finally, given the “baggage” associated with the phrase, it has been suggested that a more appropriate label would be “to direct and to determine”, but this has not been adopted more widely: see Richard Macrory *Regulation, Enforcement and Governance in Environmental Law* (2nd ed, Hart Publishing, Oxford, 2014) at 6.

<sup>51</sup> Sections 9 and 11-15.

national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.<sup>52</sup>

When it comes to enforcing these duties and restrictions, the first point to note is that this does not have to be – and often should not be – done formally. As the Court of Appeal stated in *Fugle v R*, “if, in the end, compliance can be achieved without resort to formal legal mechanisms, the objectives of the RMA will in many cases have been met.”<sup>53</sup> But informal options will not always suffice, and therefore the Act sets out a number of “controls”. These can be split into directive controls, which require a person to do something (or not do something) to ensure compliance, and punitive controls, which penalise an offender for non-compliance.<sup>54</sup> The former includes the abatement notice and the enforcement order, and the latter includes the infringement notice regime and offences, and a local authority can choose to go down either route, or both directive and punitive routes (simultaneously or one after another). In the remainder of this section, abatement notices, enforcement orders, the infringement notice regime and finally the offences themselves are discussed.

Abatement notices are a lower-level directive measure. They are issued by enforcement officers using a prescribed form and there are, broadly, two types.<sup>55</sup> The first requires someone to cease doing something that is contravening the RMA, any regulations made under the Act, a rule in a plan or a resource consent.<sup>56</sup> The second requires someone to do something to ensure compliance by or on behalf of that person with the Act, any regulations, a rule in a plan or a proposed plan, or a resource consent, but can only be issued where it is also necessary to avoid, remedy, or mitigate any actual or likely adverse effect on the environment caused by or on behalf of the person or relating to any land of which the person is the owner or occupier.<sup>57</sup> An abatement notice may be made subject to such conditions as the enforcement officer serving it thinks fit,<sup>58</sup> and all that is required to issue one is for the enforcement officer to have reasonable grounds for believing that any of the circumstances

---

<sup>52</sup> There is also a duty to avoid unreasonable noise (s 16) and to avoid, remedy, or mitigate adverse effects (s 17), but a contravention (or permitting the contravention) of these does not attract criminal sanctions (other enforcement responses are, however, available).

<sup>53</sup> *Fugle v R* [2016] NZCA 619, [2017] NZRMA 359 at [30].

<sup>54</sup> Ministry for the Environment *Best Practice Guidelines for Compliance, Monitoring and Enforcement under the Resource Management Act 1991* (2018) at 11 and 69.

<sup>55</sup> Resource Management (Forms, Fees, and Procedure) Regulations 2003, Form 48.

<sup>56</sup> RMA, s 322(1)(a).

<sup>57</sup> Section 322(1)(b).

<sup>58</sup> Section 322(3).

justifying its issuance exist.<sup>59</sup> An abatement notice must be complied with before the period specified in the notice expires,<sup>60</sup> which can be immediate (so long as this is reasonable and the notice was not issued under s 322(1)(a)(ii) of the Act),<sup>61</sup> and it can be of indefinite duration.<sup>62</sup> An appeal against a notice must be made to the Environment Court, and this will not automatically operate as a stay (except for a prospective s 322(1)(a) notice).<sup>63</sup>

Enforcement orders (and interim enforcement orders) are higher-level directive measures. They are made by the Environment Court, following an application with a supporting affidavit(s).<sup>64</sup> An enforcement order covers not only the same general ground as an abatement notice, but other matters. For instance, it can require a person to remedy or mitigate any adverse effect on the environment caused by or on behalf of that person,<sup>65</sup> or require a person to pay money to or reimburse any other person for any actual and reasonable costs and expenses which the other person has incurred or is likely to incur in avoiding, remedying, or mitigating any adverse effect on the environment.<sup>66</sup> Most enforcement orders can be applied for by “any person”, although some, for instance where it relates to changing or cancelling a resource consent, are restricted to local authorities.<sup>67</sup>

Infringement offences are a lower-level punitive response. The infringement offence regime is engaged by an enforcement officer who has observed a person committing an infringement offence, or who has reasonable cause to believe such an offence is being or has been committed by that person, serving that person with an infringement notice.<sup>68</sup> Penalties range from \$300 to \$1,000 and no conviction is entered.<sup>69</sup> If the infringement fee is paid, the matter is at an end. If it is not paid within 28 days, the local authority can issue a reminder notice, and if it remains unpaid after a further 28 days then the local authority can file the notice in

---

<sup>59</sup> Section 322(4).

<sup>60</sup> Section 323(1)(a).

<sup>61</sup> Section 324(d). Before the Resource Management Amendment Act 1997, the period within which the action shall be taken, or cease, could not be less than seven days from the date on which the notice was served.

<sup>62</sup> *Roberts v Northland Regional Council* [2014] NZHC 284.

<sup>63</sup> Section 325(3)(a). A stay can be granted by an Environment Judge: s 325(3)(b).

<sup>64</sup> Section 316 and Resource Management (Forms, Fees, and Procedure) Regulations 2003, Form 43. It is also an available option on sentencing: see s 339(5)(a).

<sup>65</sup> Section 314(1)(c).

<sup>66</sup> Section 314(1)(d). This is only where the person against whom the order is sought fails to comply with an order under any other paragraph of s 314(1), an abatement notice, a rule in a plan or a proposed plan or a resource consent or any of that person's other obligations under the Act.

<sup>67</sup> Sections 314(1)(e) and 316(2).

<sup>68</sup> Section 343C(1).

<sup>69</sup> It has been proposed that the maximum fee be increased to \$2,000 for natural persons and \$4,000 for non-natural persons: see Cabinet Paper *Proposed Resource Management Amendment Bill: Stage 1 of a resource management system review* (2018) at [64]-[65]; Resource Management Amendment Bill 2019 (180-1).

Court. A hearing will then be held to determine whether or not the offence has been committed. If so, the Court is not restricted to the infringement fee when imposing the penalty.<sup>70</sup>

Infringement offences were not included in the RMA when it was first enacted, but in 1996 the Act was amended to incorporate such a regime (although it did not become operational until regulations were promulgated in 1999).<sup>71</sup> When the amendment bill that brought in the infringement offence regime was introduced, it was put forward as “the only sensible cost-effective way of enabling minor breaches to be dealt with swiftly”; otherwise, it was said, such breaches would not be enforced.<sup>72</sup> Almost all of the offences in s 338 of the RMA were (ultimately) made infringement offences, with breach of an enforcement order being the main exception.

In 2012, the Supreme Court decided that the RMA’s infringement offence regime was “standalone”.<sup>73</sup> This was instead of it using the infringement notice process set out in s 21 of the Summary Proceedings Act 1957, with only aspects of this process incorporated by reason of s 343C(4) of the RMA. This meant that, rather than requiring the leave of a District Court Judge or Registrar before a prosecution can be commenced, those enforcing the provisions of the RMA could decide themselves whether to commence a prosecution or issue an infringement notice, such choice being “entirely a matter of prosecutorial judgment in every case”.<sup>74</sup>

The final “control” is the offences, the higher-level punitive response, and these can be separated into three “categories”.<sup>75</sup> First, breaches of duties and restrictions and breaches of enforcement orders, abatement notices (other than for unreasonable noise) and water shortage directions.<sup>76</sup> Second, failures to provide information to enforcement officers and to protect sensitive information, and breaches of excessive noise directions, abatement notices for

---

<sup>70</sup> *Otago Regional Council v Bloem* [2010] NZRMA 322 (DC).

<sup>71</sup> See Resource Management Amendment Act 1996, which inserted ss 343A to 343D into the RMA; Resource Management (Infringement Offences) Regulations 1999.

<sup>72</sup> See the speech of Hon Simon Upton MP in (14 December 1995) 552 NZPD 410-411.

<sup>73</sup> *Down v R* [2012] NZSC 21, [2012] 2 NZLR 585.

<sup>74</sup> At [30].

<sup>75</sup> Ceri Warnock and Karenza de Silva “Compliance and Enforcement” in Peter Salmon and David Grinlinton (eds) *Environmental law in New Zealand* (Thomson Reuters, Wellington, 2015) 977 at 1014-1015.

<sup>76</sup> RMA, s 338(1), (1A) and (1B). Subsections (1A) and (1B) were introduced by the Resource Management Amendment Act 1994, which came into force on 20 August 1998.

unreasonable noise and other Environment Court orders.<sup>77</sup> Third, obstruction of enforcement processes and breaches of provisions relating to esplanade or access strips.<sup>78</sup>

The second and third categories of offence are not considered in this thesis, for two reasons. One is that they are less serious than the offences in the first category, the maximum penalty for offences in the second category being a fine not exceeding \$10,000 and the maximum penalty for offences in the third category being a fine not exceeding \$1,500.<sup>79</sup> The other is that they are prosecuted very infrequently. For instance, in the period 1 July 2008 to 30 September 2012 there were only three prosecutions under s 338(3)(a) (for obstructing enforcement officers) and no prosecutions for contraventions of s 338(2) or s 338(3)(b) or (c).<sup>80</sup> All references to “offences” from this point are solely to those in the first category, and typically to breaches of duties and restrictions and breaches of enforcement orders and abatement notices.

#### *IV The RMA’s Offences, Penalties and Institutional Arrangements*

In terms of the offences, the primary provision for the purpose of this thesis is s 338(1):

(1) Every person commits an offence against this Act who contravenes, or permits a contravention of, any of the following:

(a) sections 9, 11, 12, 13, 14, and 15 (which impose duties and restrictions in relation to land, subdivision, the coastal marine area, the beds of certain rivers and lakes, water, and discharges of contaminants);

(b) any enforcement order:

(c) any abatement notice, other than a notice under section 322(1)(c):

(d) any water shortage direction under section 329.

Section 338(1) is supported by two other provisions in the Act. The first is s 340, which provides for both vicarious liability and, where a non-natural person has been convicted, a mechanism to also convict directors and those involved in the management of the defendant.

---

<sup>77</sup> Section 338(2).

<sup>78</sup> Section 338(3).

<sup>79</sup> Section 339(2) and (3), respectively.

<sup>80</sup> Ministry for the Environment *A study into the use of prosecutions under the Resource Management Act 1991: 1 July 2008 - 30 September 2012* (October 2013) at 11 and 13. It is not clear from the National Monitoring System data how many of these prosecutions there were in 2014/2015, 2015/2016 or 2016/2017, as these fall under the heading “other” (which includes breaches of an abatement notice and an enforcement order), but there were only 14 “other” prosecutions in 2014/2015, 1 “other” prosecution in 2015/2016 and 2 “other” prosecutions in 2016/2017.

In terms of vicarious liability, there are defences for the party that is *prima facie* liable if it can prove that it did not know, and could not reasonably be expected to have known, that the offence was to be or was being committed, or it took all reasonable steps to prevent the commission of the offence, and in both cases the defendant also needs to prove that it took all reasonable steps to remedy any effects of the act or omission giving rise to the offence. In terms of the mechanism to convict directors and those involved in the management of the defendant, the prosecution must prove that the act or omission that constituted the offence took place with his or her authority, permission, or consent and that he or she knew, or could reasonably be expected to have known, that the offence was to be or was being committed and failed to take all reasonable steps to prevent or stop it.

The second provision that supports s 338(1) is s 341, which provides that, in a prosecution for an offence of contravening or permitting a contravention of any of ss 9, 11, 12, 13, 14 and 15, the prosecution does not have to prove that the defendant intended to commit the offence. This is subject to two defences, one relating to necessity and the other to events beyond the control of the defendant, and in both cases the effects of the action or event must have been adequately mitigated or remedied by the defendant after it occurred. If these defences are to be relied on, they must be notified to the prosecution, together with the facts that support the defence, “within 7 days after the service of the summons” (or longer if the Court allows).<sup>81</sup>

In terms of penalties, the main provision is s 339(1):<sup>82</sup>

Every person who commits an offence against section 338(1), (1A), or (1B) is liable on conviction,—

(a) in the case of a natural person, to imprisonment for a term not exceeding 2 years or a fine not exceeding \$300,000:

(b) in the case of a person other than a natural person, to a fine not exceeding \$600,000.

These penalties are then augmented by the rest of s 339 and by s 342. In terms of the former, where the offence is a continuing one the maximum penalty increases by \$10,000 for “every day or part of a day during which the offence continues”.<sup>83</sup> The Act also provides that the

---

<sup>81</sup> Section 341(3).

<sup>82</sup> When the RMA was enacted, there was one penalty of imprisonment for a term not exceeding 2 years or a fine not exceeding \$200,000. The penalties were split between natural and non-natural persons, and increased, in 2009: see Resource Management (Simplifying and Streamlining) Amendment Act 2009.

<sup>83</sup> Section 339(1A).



Court can sentence natural persons to community work,<sup>84</sup> and the Court may, instead of or in addition to imposing a fine or a term of imprisonment, make an enforcement order or, if the offence involves an act or omission that contravenes a resource consent, make an order requiring a consent authority to serve notice of the review of a resource consent held by the person.<sup>85</sup> Section 342 provides that at least 90% of any fine imposed is to be paid to the local authority that commenced the proceeding,<sup>86</sup> with scope for some or all of the remaining 10% to also be paid to the local authority “where any money awarded by a court in respect of any loss or damage is recovered as a fine”.<sup>87</sup>

In terms of the institutional arrangements for hearing prosecutions, the implication from s 342 is that charges are generally brought by local authorities. However, this provision only outlines the consequences of what happens when a council brings a (successful) case, rather than a requirement that it does so. Instead, the main direction to local authorities regarding enforcement is in s 84(1) of the Act, which provides that “[w]hile a policy statement or a plan is operative, the regional council or territorial authority concerned, and every consent authority, shall observe and, to the extent of its authority, enforce the observance of the policy statement or plan.” According to the Ministry for the Environment, this “creates a general duty on councils to implement their own plans and policy statements, which requires councils to carry out [compliance, monitoring and enforcement] to monitor compliance and respond to non-compliance”.<sup>88</sup>

Finally, s 309 provides that RMA prosecutions are heard in the District Court but, unless otherwise directed by the Chief District Court Judge, by an Environment Judge (as opposed to a generally warranted District Court Judge). An Environment Judge is also a District Court Judge,<sup>89</sup> and is appointed by the Governor-General on the recommendation of the Attorney-General, after consultation with the Minister for the Environment and the Minister of Maori Affairs.<sup>90</sup> Provision is also made for the appointment of alternate Environment Judges, who “may act as an Environment Judge when the Principal Environment Judge, in

---

<sup>84</sup> Section 339(4). Sections 45(1)(a), 54B(1)(a), 69B(1)(a) and 80A(1)(a) of the Sentencing Act 2002 allow the Court to also impose (respectively) sentences of supervision, intensive supervision, community detention and home detention.

<sup>85</sup> Section 339(5).

<sup>86</sup> Section 342(1) & (2).

<sup>87</sup> Section 342(3).

<sup>88</sup> Ministry for the Environment, above n 54, at 13.

<sup>89</sup> Section 249(1).

<sup>90</sup> Section 250(1).

consultation with the Chief District Court Judge or Chief Maori Land Court Judge, considers it necessary for the alternate Environment Judge to do so”.<sup>91</sup>

## *V Conclusion*

The RMA is an example of regulation in its narrowest sense. Faced with the prospect of market failure caused by externalities, and with private law an inappropriate option to correct this, the government has chosen to intervene in (primarily) a command and control manner. The Act sets out a number of rules (“commands”) that must be adhered to, with those in breach becoming subject to a variety of directive and punitive responses (“controls”). The most serious punitive response is the offences, which, together with the penalties and institutional arrangements for hearing prosecutions, are the subject of this thesis.

Stepping back, it can be observed that the offences engage three overlapping theoretical areas. First, they are a means of enforcement, being one way in which the regulator can secure compliance with the Act. Second, as a punitive response the offences are concerned with the imposition of sanctions on transgressors. Third and finally, the offences rely on the criminal law for determining whether a breach has occurred and what penalty, if any, should be imposed. These three areas – regulatory compliance and enforcement, sanctions and the use of the criminal law – are, accordingly, the subject of the next chapter.

---

<sup>91</sup> Section 252(1).

## Chapter 3 – Compliance and Enforcement, Sanctions and the Criminal Law

---

### *I Introduction*

As noted in Chapter 1, this thesis asks whether the offences in the RMA are working, by reference to two criteria: are the offences effective and are they being used by the local authorities appropriately. It is necessary to develop a framework against which this question can be answered, and as noted in the previous chapter the offences fall within three overlapping theoretical areas. These are regulatory compliance and enforcement, the imposition of sanctions and the use of the criminal law. Each of these areas is dealt with in this chapter, although compliance and enforcement are dealt with in separate sections for ease of reading.

Section II starts by considering the different levels of compliance a regulator can aim for, focussing on the difference between “full” and “optimal” compliance, before moving on to review some of the reasons why people comply, and do not comply, with regulatory rules. Attention then turns to enforcement, in section III, with the observation that this is generally undertaken by a public agency, rather than privately, for reasons of consistency and competency. Next, the critical questions of where and how to intervene are considered, and it is noted that a “regulatory orthodoxy” has developed that involves using a risk-based approach to the former and a “responsive” approach to the latter, which favours the use of sanctions only when lower-level measures have failed or are inadequate.

Section IV looks at the reasons why sanctions are imposed, there being a divergence of opinion between regulatory scholars, who typically favour deterrence, and criminal law theorists, who prefer desert. Deterrence theory suggests that rational regulatees will be deterred if the expected cost of offending, made up of the severity of the penalty and the probability it is imposed, exceeds the expected benefit from offending. On the other hand, desert theory is backward-looking and is concerned with the penalty imposed being proportionate to the seriousness of the offending.

This chapter concludes by reviewing, in section V, the use of the criminal law in regulatory statutes, considering this from the questions of when to employ it and how offences should be

applied by enforcers.<sup>1</sup> While the criminal law should primarily be reserved for serious wrongdoing, assessed in terms of harm and culpability, this does not make it automatically inappropriate for regulatory breaches; rather, the problem is that offences in regulatory statutes often capture both harmful and non-harmful conduct, and culpable and non-culpable behaviour. The drafting of offences also has implications for their application, as the broader an offence is drafted the more discretion an enforcer will have, and this leads to an increased risk that the offence will be applied improperly. Accordingly, such discretion needs to be constrained and there must be checks on its use.

## *II Compliance*

It is trite to note that a regulatory regime will only be effective if it is complied with. But what level of compliance should a regulator aim for? Why do some people comply with rules and others not? These questions are considered in this section, but before doing so two preliminary points on compliance are required.

The first point is that a distinction can be made between compliance with the collective goals of a regulatory system and compliance with specific regulatory standards.<sup>2</sup> An example of the former would be the goal of reducing pollution, and an example of the latter would be a prohibition on discharging contaminants into waterways. It is compliance with specific regulatory standards that are relevant for this thesis, as these are what the offences “attach” to, with the assumption being that compliance with such rules will result in compliance with the overall goals of the regulatory regime.<sup>3</sup>

The second point is that determining whether someone is complying with a regulatory rule can be difficult. There are a number of dimensions that make up a rule – for instance, its degree of specificity or precision, its extent or inclusiveness, its accessibility and intelligibility, its status and force, and the type of prescription or sanction involved<sup>4</sup> – and

---

<sup>1</sup> This follows the approach taken by Ball and Friedman of dividing the word “use” into “employed” (by the legislature) and “applied” (by the enforcer): see Harry Ball and Lawrence Friedman “The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View” (1965) 17(2) *Stanford Law Review* 197 at 199.

<sup>2</sup> Karen Yeung *Securing compliance: a principled approach* (Hart Publishing, Oxford, 2004) at 11.

<sup>3</sup> However, it is important to note that this may not necessarily hold true, as complying with poorly designed standards may not advance the collective goals: see Carolyn Abbot *Enforcing Pollution Control Regulation* (Hart Publishing, Portland, 2009) at 5; Organisation for Economic Co-operation and Development *Reducing the risk of policy failure: challenges for regulatory compliance* (2000) at 11.

<sup>4</sup> Robert Baldwin “Why Rules Don't Work” (1990) 53(3) *Modern Law Review* 321 at 321. Diver distinguishes between three elements of regulatory precision – transparency, accessibility and congruence: see Colin Diver “The Optimal Precision of Administrative Rules” (1983) 93(1) *The Yale Law Journal* 65 at 66.

regulatory rules have a tendency to be vague and involve broad legal standards and wide discretion.<sup>5</sup> This is often due to the high information costs and analysis required to design rules that reflect specific conditions, and means that it is not always clear whether a party is, or is not, complying.<sup>6</sup> The regulator and the regulatee may have quite different views as to whether the latter is conforming with the rule, which can lead to negotiation between the parties and an agreement that certain steps will be taken by the regulatee in return for the regulator taking no further action.<sup>7</sup> Compliance is therefore often described as a process, rather than a condition.<sup>8</sup>

### *A Levels of Compliance*

Defining compliance as a process, rather than a condition, suggests that “full compliance” – that is, every regulatee performing to the required standard at all times – is something that may not be achievable. But should full compliance be the goal of the regulator anyway? If not, what alternative level of compliance should a regulator aim for?

Full compliance has a superficial attraction. As noted above, rules are (assumed to be) made to fulfil policy goals. If these rules are not complied with, this will result in the specific problem arising that the rule prohibits, and it may also thwart the overall goal. Undoubtedly, there are some rules where full compliance will be necessary, for instance in highly dangerous industries where a breach would have catastrophic consequences. However, in respect of a number of regulatory rules it will sometimes be in a regulator’s interests to overlook strict rule compliance, such as where the breach is technical and the regulatee is still in compliance with the regime’s ultimate objectives.<sup>9</sup> Further, requiring compliance with each and every rule could have unintended consequences, for instance by developing a culture of resistance in the regulatee, hindering ongoing relationships and ultimately leading to less overall compliance.

---

<sup>5</sup> Bridget Hutter *Compliance: Regulation and Environment* (Clarendon Press, Oxford, 1997) at 3.

<sup>6</sup> Keith Hawkins and John Thomas “The Enforcement Process in Regulatory Bureaucracies” in Keith Hawkins and John Thomas (eds) *Enforcing Regulation* (Kluwer-Nijhoff Publishing, Boston, 1984) at 12.

<sup>7</sup> Keith Hawkins *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (Oxford University Press, Oxford, 2002) at 41-43.

<sup>8</sup> Keith Hawkins *Environment and Enforcement: Regulation and the Social Definition of Pollution* (Clarendon Press, Oxford, 1984) at 126. See also Hutter, above n 5, at 13-17.

<sup>9</sup> John Scholz “Cooperation, Deterrence, and the Ecology of Regulatory Enforcement” (1984) 18(2) *Law & Society Review* 179 at 183-184; Ian Ayres and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, New York, 1992) at 60-61.

The main reason, however, why a regulator is unlikely to aim for full compliance is cost. Inevitably, enforcement is expensive and budgets are limited.<sup>10</sup> Of course, there are ways to reduce the cost of enforcement, and it would be technically possible to divert funds from other areas into enforcement, such that every (or almost every) breach could be detected and the transgressor dealt with. But even then, economists suggest that this would not be appropriate, and instead of full compliance the goal should be “optimal compliance”.<sup>11</sup>

Optimal compliance requires the balancing of three sets of costs. These are the costs associated with the rule breach (for example, the harm caused by allowing emissions over the permitted levels), the costs the regulatee will incur in complying with the rule (for example, the cost to a business owner of installing equipment to reduce emissions to the permitted levels) and the costs to the regulator in enforcing the rule (for example, the costs of detecting and prosecuting those found to be emitting in excess of the permitted levels).<sup>12</sup> Optimal compliance will be achieved when the avoided social harm (the costs of the rule breach that would have been incurred) is equal to the compliance and enforcement costs. It must be noted that including compliance costs in the calculation can be controversial – for instance, it would be difficult to justify this when considering, say, breaches of the Crimes Act 1961 – but it is generally considered acceptable in regulatory matters, given the emphasis on modifying socially valuable activities as opposed to outright prohibitions.<sup>13</sup> Ultimately, applying a goal of optimal compliance will lead to an “efficient” level of breaches.<sup>14</sup>

There are, however, issues with optimal compliance as the goal. For instance, taking a strict economic approach to what breaches will be enforced can lead to allegations of differential treatment, and it can encourage otherwise law-abiding regulatees to breach rules when they see others “getting away with it”. Further, the public may not understand why regulators are

---

<sup>10</sup> George Stigler “The Optimum Enforcement of Laws” (1970) 78(3) *Journal of Political Economy* 526; Nuno Garoupa “The Theory of Optimal Law Enforcement” (1997) 11(3) *Journal of Economic Surveys* 267. This point is returned to in section III below.

<sup>11</sup> Ogus and Abbot have argued that “since regulation is not self-enforcing and that the securing of compliance by a public agency involves (substantial) resources, perfect compliance is neither possible nor desirable”: see Anthony Ogus and Carolyn Abbot “Sanctions for Pollution: Do we have the right regime?” (2002) 14(3) *Journal of Environmental Law* 283 at 289.

<sup>12</sup> Abbot, above n 3, at 6-7. See also Cento Veljanovski “The Economics of Regulatory Enforcement” in Keith Hawkins and John Thomas (eds) *Enforcing Regulation* (Kluwer-Nijhoff Publishing, Boston, 1984). Veljanovski notes, at 173, that there is a fourth set of costs – rulemaking costs – but by the time one comes to enforcement these are “sunk costs” and so should be ignored from the calculation.

<sup>13</sup> Colin Diver “A Theory of Regulatory Enforcement” (1980) 28(3) *Public Policy* 257 at 264, n 16.

<sup>14</sup> Mark Cohen “Empirical Research on the Deterrent Effect of Environmental Monitoring and Enforcement” (2000) 30 *Environmental Law Reporter* 10245 at 10245. Put another way, “[i]f the scale of enforcement is correct, society is not spending two dollars to save itself one dollar of damage, or failing to spend one dollar where it will save more than that amount of damage”: Stigler, above n 10, at 533.

taking no action against a business that has been caught breaking the law, which can lead to a loss of confidence in the regulatory system. On a practical level, it can be hard to operationalise as it requires detailed knowledge of the various costs involved, which may be difficult, especially in areas like the environment when there is no market for some of the resources to be valued.<sup>15</sup>

This suggests that optimal compliance should be the starting point, but that for political (or other) reasons the regulator may choose to seek a level of compliance above this (but still less than full compliance).<sup>16</sup> What is important, however, is that the regulator not only makes this decision, but can also justify it, both to the regulated community and the public at large. The regulator must then develop a strategy for achieving it, and this will first require an understanding of what motivates regulatees to comply (or not comply) with regulatory rules.

### *B Reasons for Compliance and Non-Compliance*

There are various reasons why people and businesses comply, or do not comply, with regulatory rules. Perhaps the most straight-forward reason why a regulatee may comply with a rule is because it is in its interests to do so.<sup>17</sup> This is best seen in areas where a breach of a regulatory standard may have catastrophic consequences that put the regulatee out of business, such as oil refineries and chemical works.<sup>18</sup> Regulatees may also comply out of self-interest when a rule is worded such that, for a particular firm, it results in the most efficient use of resources for it.<sup>19</sup> However, it might be expected that this would happen infrequently since, as noted in the subsection above, regulatory rules are often drafted at a high level of generality.

Another group of regulatees may comply with rules for normative reasons (that is, based on their internal values).<sup>20</sup> Their obedience is determined by their general moral principles – a civic sense of duty to obey laws – and a specific evaluation of a particular rule, which is made up of the rule’s reasonableness, how it was enacted and the approach of the authorities

---

<sup>15</sup> Abbot, above n 3, at 7.

<sup>16</sup> For instance, Abbot adopts (at 7) an “alternative normative goal of enforcement, namely enforcement which achieves a ‘high level of compliance’”.

<sup>17</sup> Hutter, above n 5, at 182; Greenstreet Berman Ltd report for Defra & Environment Agency (UK) *Business perspectives on securing compliance* (2011) at 22.

<sup>18</sup> Hazel Genn “Business Responses to the Regulation of Health and Safety in England” (1993) 15(3) *Law & Policy* 219 at 223.

<sup>19</sup> Abbot, above n 3, at 31.

<sup>20</sup> Raymond Burby and Robert Paterson “Improving Compliance with State Environmental Regulations” (1993) 12(4) *Journal of Policy Analysis and Management* 753 at 756; Jack Gibbs “Crime, Punishment, and Deterrence” (1968) 48(4) *Southwestern Social Science Quarterly* 515 at 517.

in enforcing it.<sup>21</sup> These factors will operate at different strengths, some regulatees' general commitment being so strong that they will follow all but the most outrageous rules, while compliance by other regulatees will be heavily dependent on the appropriateness of a particular rule and how it was made.<sup>22</sup>

The above reasons for compliance broadly fall into what could be called "affirmative motivations", or "good intentions and a sense of obligation to comply".<sup>23</sup> On the other hand, there are reasons that could be called "negative motivations", which are "fears of the consequences of being found in violation of regulatory requirements".<sup>24</sup> The regulatees that comply for these latter reasons are often called "amoral calculators"<sup>25</sup> or, less pejoratively, "rational utility maximisers".<sup>26</sup> This is because they do not consider the rightfulness or wrongfulness of complying (either generally or in a specific case) and instead assess their expected gain from violating a regulatory law against the expected cost of doing so, complying only if the latter is higher than the former.<sup>27</sup> The expected gain may, for instance, be the money saved by not investing in equipment that will prevent a contravention, while the expected cost includes formal and informal sanctions imposed by, or on behalf of, the regulator.

Finally, it is necessary to mention two further groups, for whom compliance (or lack thereof) is not necessarily an explicit choice. The first is those regulatees that, despite being willing to comply, simply cannot due to technological, economic or practical limitations. For example,

---

<sup>21</sup> Søren Winter and Peter May "Motivation for Compliance with Environmental Regulations" (2001) 20(4) *Journal of Policy Analysis and Management* 675 at 677-678. This is different to complying with "social norms", which are not legal rules or backed by legal sanctions: see Richard Posner "Social Norms and the Law: An Economic Approach" (1997) 87(2) *The American Economic Review* 365.

<sup>22</sup> While this is understandable for individuals, there are some suggestions that such reasons are less relevant – as a standalone factor – for (at least large) companies: see, for example, Carole Gibbs "Corporate citizenship and corporate environmental performance" (2012) 57(4) *Crime, Law and Social Change* 345. As will be seen in section III below, certain enforcement strategies, such as responsive regulation, actively seek to build a normative commitment: see Christine Parker "The 'Compliance' Trap: The Moral Message in Responsive Regulatory Enforcement" (2006) 40(3) *Law & Society Review* 591.

<sup>23</sup> Peter May "Compliance Motivations: Affirmative and Negative Bases" (2004) 38(1) *Law & Society Review* 41 at 42.

<sup>24</sup> At 42. Sometimes whether a reason is viewed as a positive or a negative motivation will depend on your perspective. For instance, Abbot cites the desire of firms to maintain a good corporate image as a positive affirmation, but her rationale – that a polluting incident, by influencing consumer and investor choice, affects the profitability of a firm – could equally be seen as a negative affirmation (a fear of the consequences of not complying): see Abbot, above n 3, at 31.

<sup>25</sup> Robert Kagan and John Scholz "The 'Criminology of the Corporation' and Regulatory Enforcement Strategies" in Keith Hawkins and John Thomas (eds) *Enforcing Regulation* (Kluwer Nijhoff Publishing, Boston, 1984) at 67-68.

<sup>26</sup> See, for example, Michael Faure and Katarina Svatikova "Criminal or Administrative Law to Protect the Environment? Evidence from Western Europe" (2012) 24(2) *Journal of Environmental Law* 253 at 257.

<sup>27</sup> This calculation is the basic premise of deterrence theory, which is discussed in more detail in section IVA below.



it may be that the pollution abatement machinery required to comply with the regulatory rules is too expensive for the small owner-operated company. Or a medium-sized business is so hopelessly disorganised that, despite having the funds available, it cannot manage the task of acquiring and installing necessary safety equipment. Such regulatees are often considered “unfortunate”, rather than wrongful, which affects how they are dealt with by enforcement officers.<sup>28</sup>

Second, some regulatees fail to comply because they do not know the rules. Of these, a portion will be well-intentioned, while others will simply not care, and the assessment of which by the enforcement officer will likely elicit a different response.<sup>29</sup> In particular, enforcement officers will be more inclined to deal with the former using informal, low level enforcement responses (such as education and assistance), whereas the latter are more likely to face formal sanctions.

### *III Enforcement*

It is often the case that, when new regulation is designed, enforcement is given low priority by government policy analysts when compared to the preparation of the substantive rules, with the tendency being to assume that compliance will be “perfect”.<sup>30</sup> However, as will be apparent, this assumption is generally not well-founded. In fact, given there are many reasons not to comply with regulation, enforcement is of critical importance. As Gunningham notes, “[e]ffective enforcement is vital to the successful implementation of social legislation, and legislation that is not enforced rarely fulfils its social objectives”.<sup>31</sup> Others go even further, stating that “no regulatory system is of any value unless it is vigorously enforced”<sup>32</sup> and that “[w]ithout a substantial level of enforcement, the rule of law is simply devoid of meaningful content”.<sup>33</sup> Enforcement is particularly critical when a regulator is dealing with small- and medium-sized businesses, given these entities are more

---

<sup>28</sup> Hawkins, above n 8, at 112.

<sup>29</sup> Baldwin, above n 4, at 324.

<sup>30</sup> Roland McKean “Enforcement Costs in Environmental and Safety Regulation” (1980) 6(3) Policy Analysis 269 at 270. See also Paul Fenn and Cento Veljanovski “A Positive Economic Theory of Regulatory Enforcement” (1988) 98 The Economic Journal 1055 at 1055.

<sup>31</sup> Neil Gunningham “Enforcement and Compliance Strategies” in Robert Baldwin, Martin Cave, and Martin Lodge (eds) *The Oxford Handbook of Regulation* (Oxford University Press, New York, 2010) at 120.

<sup>32</sup> Raymond Mushal “Reflections upon American Environmental Enforcement Experience as it may relate to Post-Hampton Developments in England and Wales” (2007) 19(2) Journal of Environmental Law 201 at 202.

<sup>33</sup> J Spigelman “The rule of law and enforcement” (2003) 26(1) University of New South Wales Law Journal 200 at 202.

likely to have resource constraints and so less ability to comply voluntarily.<sup>34</sup> Regulatees in New Zealand often fit into this category, with 97% of enterprises having fewer than 20 employees.<sup>35</sup>

Enforcement has connotations of taking formal action against transgressors, but it is much more than this, a better definition being any means of securing compliance with the law.<sup>36</sup> Like compliance, enforcement is often a process, there being a number of interactions between the regulator and regulatee before the former is satisfied with the position the latter has reached.<sup>37</sup> It is also necessary to view enforcement in the context of being one of a number of regulatory implementation tasks, whether these are detecting, responding, enforcing, assessing and modifying,<sup>38</sup> informing and educating, administering and supporting, enforcing and sanctioning and monitoring and adjusting,<sup>39</sup> or another taxonomy altogether.

As was noted previously when discussing levels of compliance, enforcement is expensive and budgets are typically limited. Enforcement officers must be employed to respond to complaints and self-reports, and to monitor and inspect regulatees. Then, if the officer considers there may have been a breach, scientific and legal analysis could be required to confirm this. Upon confirmation of a breach, the enforcement officer may decide that a response is required and, as a general rule, the cost will increase with the level of formality. For instance, issuing an administrative notice will be more expensive than a warning, and prosecuting an offender will cost more than an issuing an administrative notice. This all happens in the context of enforcement being only one part of a regulator's role, with many branches of a public agency also seeking access to scarce resources.

---

<sup>34</sup> Neil Gunningham "Regulating Small and Medium Sized Enterprises" (2002) 14(1) *Journal of Environmental Law* 3 at 22-23.

<sup>35</sup> Ministry of Business Innovation & Employment *Small Businesses in New Zealand* (June 2017).

<sup>36</sup> See, for example, Cheryl Wasserman "Federal Enforcement: Theory and Practice" in Tom Tietenberg (ed) *Innovation in environmental policy: economic and legal aspects of recent developments in environmental enforcement and liability* (EE Elgar, Aldershot, 1992) 21 at 23, cited in Ceri Warnock and Karenza de Silva "Compliance and Enforcement" in Peter Salmon and David Grinlinton (eds) *Environmental law in New Zealand* (Thomson Reuters, Wellington, 2015) 977 at 996.

<sup>37</sup> Indeed, an inspector's decisions have been described as only becoming "understandable when placed in this context as instalments in an ongoing sequence of 'transactions' between the Department and the offender": see WG Carson "Some Sociological Aspects of Strict Liability and the Enforcement of Factory Legislation" (1970) 33(4) *Modern Law Review* 396 at 407.

<sup>38</sup> Robert Baldwin, Martin Cave and Martin Lodge *Understanding Regulation* (2nd ed, Oxford University Press, New York, 2011) at 211.

<sup>39</sup> Eric Windholz *Governing through regulation: public policy, regulation and the law* (Routledge, New York, 2017) at 227-230.

The costs incurred in enforcing regulation, coupled with constrained budgets, mean that regulators have to make decisions as to where to intervene and how to intervene.<sup>40</sup> However, before moving on to these questions, it is necessary to ask why then, in light of these factors, enforcement is nevertheless typically the role of a public agency, rather than undertaken privately.

### *A Public versus Private Enforcement*

Public enforcement of regulation should not be confused with the question as to why there is public regulation (for instance, rules backed by negative sanctions) instead of relying on private law (for instance, tort claims).<sup>41</sup> Rather, the question is why a public agency is usually entrusted with the responsibility of enforcing (public) regulation, instead of enforcement being undertaken privately (for example, by the victim of a regulatory breach). Private enforcement of regulatory laws was the approach historically taken, enforcers being paid “bounties” for the apprehension and conviction of offenders, and sharing any fines awarded by the courts with the Crown.<sup>42</sup> Even as public agencies began to develop and were given regulatory enforcement powers, the vast majority of prosecutions were still undertaken privately.<sup>43</sup> This did not change until the middle of the 19th century, after which time public agencies increasingly became involved, to the point where they are now almost exclusively responsible for regulatory enforcement.<sup>44</sup> In modern times, the public’s role is generally limited to reporting suspected violations, giving evidence in court proceedings and, sometimes, pressuring public agencies into taking action.<sup>45</sup>

---

<sup>40</sup> Dividing the issue of enforcement into “where to intervene” and “how to intervene” follows the approach in Neil Gunningham “Enforcing Environmental Regulation” (2011) 23(2) *Journal of Environmental Law* 169. It can be noted that these questions arise due to the considerable discretion regulators are typically provided with (Fenn and Veljanovski, above n 30, at 1057), but it would be possible for a regime to be developed such that the regulator was given no choice over these matters (Kagan and Scholz, above n 25, at 69), such as legislative directives that all regulatees are to be inspected and all violations prosecuted.

<sup>41</sup> As to which, see Chapter 2.

<sup>42</sup> William Landes and Richard Posner “The Private Enforcement of Law” (1975) 4(1) *The Journal of Legal Studies* 1 at 2; Colin Scott *Regulatory Crime: History, Functions, Problems, Solutions* (University College Dublin, UCD Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper No. 13/2009, 2009) at 6.

<sup>43</sup> Anthony Ogus “Regulatory law: some lessons from the past” (1992) 12(1) *Legal Studies* 1 at 15-18.

<sup>44</sup> Nuno Garoupa, Anthony Ogus and Andrew Sanders “The Investigation and Prosecution of Regulatory Offences: Is There An Economic Case for Integration?” (2011) 70(1) *Cambridge Law Journal* 229 at 237-238.

<sup>45</sup> A return to private enforcement was suggested around the final quarter of the 20th century, on the basis that it would lead to optimal enforcement: see Gary Becker and George Stigler “Law Enforcement, Malfeasance, and Compensation of Enforcers” (1974) 3(1) *The Journal of Legal Studies* 1. However, the accuracy of the claim that it would lead to optimal enforcement has been questioned: Landes and Posner, above n 42; A Mitchell Polinsky “Private versus Public Enforcement of Fines” (1980) 9(1) *The Journal of Legal Studies* 105.

The shift to public enforcement of regulation can be partially explained by the fact that many regulatory breaches have no identifiable victim. However, that only explains why *victim* enforcement is not required, not why private parties cannot perform the task of enforcement.<sup>46</sup> Rather, the best explanation is that private enforcement runs the risk of interfering with ongoing relationships between regulators and regulatees, it has the potential for inconsistency and unpredictability, and it may be done incompetently.<sup>47</sup> As such, the ideal role is said to be that “citizens would complement, not replace, enforcement by government agencies.”<sup>48</sup>

### *B Where and How to Intervene*

In the usual course, therefore, enforcement will primarily be undertaken by a public agency, and the first step in securing compliance is for the agency to identify those regulatees that are in breach. This can be done in various ways. A large proportion of an enforcement officer’s role is taken up by external, or reactive, tasks.<sup>49</sup> For instance, breaches could be reported by a member of the public or declared by the regulated party itself. The latter is not as uncommon as it may seem, as self-reporting of breaches is often a condition of a licence issued by a regulator (and breaching this condition may place the licence in jeopardy) and, even if it is not a condition, then self-reporting may result in more lenient action by the regulator. Other ways of identifying those in breach are proactive or internal to the regulator. For instance, it could be found during a random inspection or picked up as part of routine monitoring (for example, of consent conditions). The focus at this point is on the internal means, as this is what the regulator has primary control over when deciding where to intervene, although external means will be returned to when discussing how to intervene.

The modern view is that, in light of scarce resources, it is best to use a risk-based approach to determining the question of where to intervene.<sup>50</sup> This has been endorsed both in New

---

<sup>46</sup> A Mitchell Polinsky and Steven Shavell “The Theory of Public Enforcement of Law” in A Mitchell Polinsky and Steven Shavell (eds) *Handbook of law and economics* (1st ed, Elsevier, Amsterdam, 2007) at 406.

<sup>47</sup> Neil Gunningham, Peter Grabosky and Darren Sinclair *Smart regulation: designing environmental policy* (Clarendon Press, Oxford, 1998) at 105-106. See also Abbot, above n 3, at 12. For a discussion on various problems with private enforcement, albeit that are largely specific to the United States of America where this is encouraged more than in Commonwealth countries, see Michael Greve “Environmentalism and bounty hunting” (1989) 97 Public Interest 15.

<sup>48</sup> Gunningham, Grabosky and Sinclair, above n 47, at 106.

<sup>49</sup> Neil Gunningham and Richard Johnstone *Regulating workplace safety: system and sanctions* (Oxford University Press, Oxford, 1999) at 105.

<sup>50</sup> Gunningham, above n 40, at 170. A similar approach to risk-based intervention is to use the problem-solving approach, which “picks the most important tasks and then selects appropriate tools in each case, rather than deciding on the important tools and picking the tasks to fit”: see Malcolm Sparrow *The Regulatory Craft* (Brookings Institution Press, Washington, DC, 2000) at 131.

Zealand<sup>51</sup> and overseas.<sup>52</sup> Risk-based regulation refers to “the use of systematised frameworks of inspection or supervision which are primarily designed to manage regulatory or institutional risk: risks to the agency itself that it will not achieve its objectives”.<sup>53</sup> As can be seen, this assessment is done at the goal level, rather than the specific rule level. This reinforces what was noted in section II above, that it may be that a regulator should overlook specific rule breaches if they do not pose a threat to the regulator’s overall objectives.<sup>54</sup>

Risk-based regulation is not without its issues. For instance, it requires an explicit decision to deprioritise low risk regulatees, which may not be accepted by interested parties, such as consumers, politicians and industry, and it may not even be legally permissible.<sup>55</sup> Further, low-risk regulatees can easily become slack and fall into the high risk category unless the regulator has review systems in place.<sup>56</sup> More broadly, the targeting of certain businesses at the expense of others raises equity issues.<sup>57</sup> There are strategies to deal with some of these problems – for instance, it is often suggested that an element of random inspection be retained to ensure that low-risk regulatees stay alert<sup>58</sup> – but these come at the expense of the efficiency benefits of risk-based regulation. Risk-based regulation also does not necessarily assist with the more important question, for present purposes, of how to intervene when a regulator identifies non-compliance (what is often called its “enforcement strategy”).<sup>59</sup> This question is dealt with next.

For many years, it was believed that regulators were faced with a choice when deciding how to secure conformity with the law. Should they primarily take “action to prevent potential law violations without the necessity to detect, process, and penalize violators”, or should they mainly be detecting “violations of law, determining who is responsible for their violation, and penalizing violators to deter violations in the future, either by those who are punished or by

---

<sup>51</sup> See, for example, New Zealand Productivity Commission *Regulatory institutions and practices* (June 2014) at 63.

<sup>52</sup> See, for example, Philip Hampton *Reducing administrative burdens: effective inspection and enforcement* (HM Treasury (UK), March 2005).

<sup>53</sup> Organisation for Economic Co-operation and Development *Risk and Regulatory Policy: Improving the Governance of Risk* (OECD Reviews of Regulatory Reform, 9 April 2010) at 187.

<sup>54</sup> Julia Black and Robert Baldwin “Really Responsive Risk-Based Regulation” (2010) 32(2) *Law & Policy* 181 at 184.

<sup>55</sup> See generally Julia Black and Robert Baldwin “When risk-based regulation aims low: Approaches and challenges” (2012) 6(1) *Regulation & Governance* 2 at 7-8. See also New Zealand Productivity Commission *Towards better local regulation* (May 2013) at 202.

<sup>56</sup> Black and Baldwin, above n 55, at 7-8.

<sup>57</sup> Gunningham and Johnstone, above n 49, at 106.

<sup>58</sup> At 110.

<sup>59</sup> Windholz, above n 39, at 240.

those who might do so were violators not penalized”?<sup>60</sup> The two approaches are often called compliance and deterrence (respectively), although such labels can be misleading given both have the same end goal of compliance, differing instead as to the means of getting there (condoning breaches versus penalising them).<sup>61</sup> They are also more accurately identified as two ends of a spectrum of approaches, rather than a strict dichotomy, with most regulators using aspects of each.<sup>62</sup>

The compliance approach, which itself has been further divided into “persuasive” (accommodative and close to “pure” compliance) and “insistent” (whereby the regulator is less benevolent and more willing to take formal action if the regulatee is not responsive to the regulator’s requests),<sup>63</sup> is favoured by those who see actors as generally good citizens.<sup>64</sup> It has historically been the approach taken by central government agencies<sup>65</sup> and local authorities in the United Kingdom and other cognate jurisdictions,<sup>66</sup> although there has perhaps been a shift towards more punitive approaches since the start of the 21st century.<sup>67</sup> Compliance-minded regulators seek to build relationships with regulatees, the idea being that a co-operative approach will lead to better long-term results. Sanctions are still an option for the regulator, but they operate in the background as a threat, to be used as a last resort,<sup>68</sup> and typically only where the regulator considers the person in non-compliance to be “at fault”.<sup>69</sup>

Advocates of a compliance approach argue that it is less expensive than relying on formal legal measures, meaning that scarce resources do not get tied up in costly litigation.<sup>70</sup> It also

---

<sup>60</sup> Albert J Reiss Jr “Selecting Strategies of Social Control over Organisational Life” in Keith Hawkins and John Thomas (eds) *Enforcing Regulation* (Kluwer-Nijhoff Publishing, Boston, 1984) at 23.

<sup>61</sup> Celia Wells *Corporations and criminal responsibility* (Clarendon Press, Oxford, 1993) at 28. The “compliance” approach has also been called “cooperative” (Scholz, above n 9, at 180) and “accommodative” (Genevra Richardson, Anthony Ogus and Paul Burrows *Policing Pollution: A Study of Regulation and Enforcement* (Clarendon Press, Oxford, 1982)), while the “deterrence” approach has also been called “penalty” (Veljanovski, above n 12, at 176) and “sanctioning” (Hawkins, above n 8, at 3).

<sup>62</sup> Patrick Bishop “Criminal law as a preventative tool of environmental regulation: compliance versus deterrence” (2009) 60(3) Northern Ireland Legal Quarterly 279 at 292. It may also be that a regulator adopts a certain strategy for one type of breach, and a different strategy for other contraventions: see Jeremy Rowan-Robinson, Paul Watchman and Christine Barker “Crime and Regulation” (1988) Criminal Law Review 211 at 216-217.

<sup>63</sup> Bridget Hutter “Variations in Regulatory Enforcement Styles” (1989) 11(2) Law & Policy 153.

<sup>64</sup> Abbot, above n 3, at 42.

<sup>65</sup> See, for example, Hawkins, above n 8. However, care needs to be taken with broad generalisations as there can be variations within a jurisdiction: Baldwin, Cave and Lodge, above n 38, at 239.

<sup>66</sup> Bernard Dickens “Discretion in Local Authority Prosecutions” [1970] Criminal Law Review 618.

<sup>67</sup> Robert Baldwin “The New Punitive Regulation” (2004) 67(3) Modern Law Review 351.

<sup>68</sup> Diver, above n 13, at 297. Indeed, it is often said that carrying “big sticks” allows regulators to “speak softly”: see Ayres and Braithwaite, above n 9, at 5.

<sup>69</sup> Hawkins, above n 8, at 161-163.

<sup>70</sup> Although it has been suggested that this is an assumption, rather than something that has been empirically proven: see Bishop, above n 62, at 294.

reflects the nature of regulation and its connotations of modifying socially beneficial behaviour, as opposed to the outright prohibitions contained in traditional criminal law and dealt with by police.<sup>71</sup> Opponents, however, claim that a compliance approach is indicative of regulatory capture – the regulatees, rather than the regulator, being in control of the regulation – and that it leads to worse results than doing nothing, as businesses that were otherwise inclined to follow rules would stop doing so once they notice that others are “getting away with it”.<sup>72</sup> Prosecuting on a “last resort” basis has also been criticised as being based on considerations of specific deterrence and administrative efficiency, “ignoring altogether the powerful general deterrent and educative impacts of criminal prosecution”.<sup>73</sup>

In contrast to a compliance approach, a deterrence strategy takes the position that regulatees are generally rational utility maximisers who need to be inspected regularly and dealt with firmly every time they break the law. This is based, at least in part, on the position that regulatees are usually businesses and thus well versed in weighing up costs and benefits. Deterrence strategies have close links to the law and economics approach,<sup>74</sup> requiring sanctions to be imposed frequently and at a sufficiently high level to convince regulatees that offending is not worth it.<sup>75</sup> They are perhaps seen most frequently in regulators from the United States of America, who are said to be more adversarial and litigious.<sup>76</sup>

Those in favour of a deterrence strategy note that it reduces the prospect of regulatory capture, as discretion is largely removed, and that it brings consistency and accountability. However, it can be expensive, as resources need to be devoted to inspection, monitoring and formal enforcement action. Further, it can lead to evasion and creative compliance, placing the regulator’s ultimate policy goals at risk. Finally, the overall evidence to support such an approach is mixed, with the best that can perhaps be said being that “those who are differently motivated are likely to respond very differently to a deterrence strategy”.<sup>77</sup>

---

<sup>71</sup> As Kagan notes “...the redistributive thrust of regulatory legislation means that the regulator’s basic function, unlike the police officer’s, is not to use the law to ‘hold the fort’ and quell outbursts of anarchy, but to change or encourage new systematic practices”: see Robert Kagan “On Regulatory Inspectorates and Police” in Keith Hawkins and John Thomas (eds) *Enforcing Regulation* (Kluwer-Nijhoff Publishing, Boston, 1984) at 44. See also his comments at 60.

<sup>72</sup> Gunningham, above n 31, at 125.

<sup>73</sup> Susan Smith “An iron fist in the velvet glove: redefining the role of criminal prosecution in creating an effective environmental enforcement system” (1995) 19(1) *Criminal Law Journal* 12 at 19.

<sup>74</sup> However, for a discussion of how adopting a compliance approach can be economically explained, see Fenn and Veljanovski, above n 30.

<sup>75</sup> See section IV below.

<sup>76</sup> Hutter, above n 5, at 6. As noted above, care does, however, need to be taken with broad generalisations.

<sup>77</sup> Gunningham, above n 31, at 124.

However, knowing what drives each regulatee to comply (or not comply) can be problematic.<sup>78</sup>

These last points set the scene for a broader approach than simply choosing compliance or deterrence, with the literature shifting, towards the end of the 20th century, from considering regulation and enforcement largely from the perspective of the regulator to considering what motivates the regulated community.<sup>79</sup> As noted in the previous section, there are a number of reasons why people comply, and do not comply, with regulatory rules, and this suggests that the enforcement response should take this into account.<sup>80</sup> For instance, a compliance approach can be taken advantage of by rational utility maximisers, while a deterrence approach provokes the wrong reaction from those “political citizens” that would ordinarily be inclined to follow rules, but deem the one in question to be unreasonable.<sup>81</sup> Neither approach may work with the firm that is willing, but unable, to comply – advice will not be of assistance and fining them (and so reducing their available resources) will make it even harder to make the required changes – nor with the ignorant, who must instead be educated and informed.

This led to a movement towards more flexible regulatory strategies (of which enforcement is more explicitly only one part),<sup>82</sup> with the seminal work of Ayres and Braithwaite and their concept of “responsive regulation”.<sup>83</sup> Using game theory in the area of regulation, Scholz had previously argued that the best approach for both the regulator and the regulatee is for them to cooperate with one another, and that they should maintain this position until one of them defects.<sup>84</sup> At this point the other party should do the same until the defector returns to cooperation. Building on this, Ayres and Braithwaite theorised that the key to successful cooperative regulation required such a “tit-for-tat” strategy, a hierarchical range of sanctions and interventionism in regulatory style, and a sanctions pyramid with a severely punitive peak.<sup>85</sup> The pyramid, which has been described as the “most distinctive part of responsive

---

<sup>78</sup> Kagan and Scholz, above n 25, at 86.

<sup>79</sup> Keith Hawkins “Enforcing Regulation: Robert Kagan's Contribution-And Some Questions” (2013) 38(4) Law & Social Inquiry 950 at 952-954.

<sup>80</sup> See, by way of example, the approach taken by the Inland Revenue Department, as depicted in Standards New Zealand *Achieving Compliance: A Guide for Compliance Agencies in New Zealand* (June 2011) at 36-37.

<sup>81</sup> Kagan and Scholz, above n 25.

<sup>82</sup> Neal Shover and Aaron Routhe “Environmental Crime” (2005) 32 Crime and Justice 321.

<sup>83</sup> Ayres and Braithwaite, above n 9.

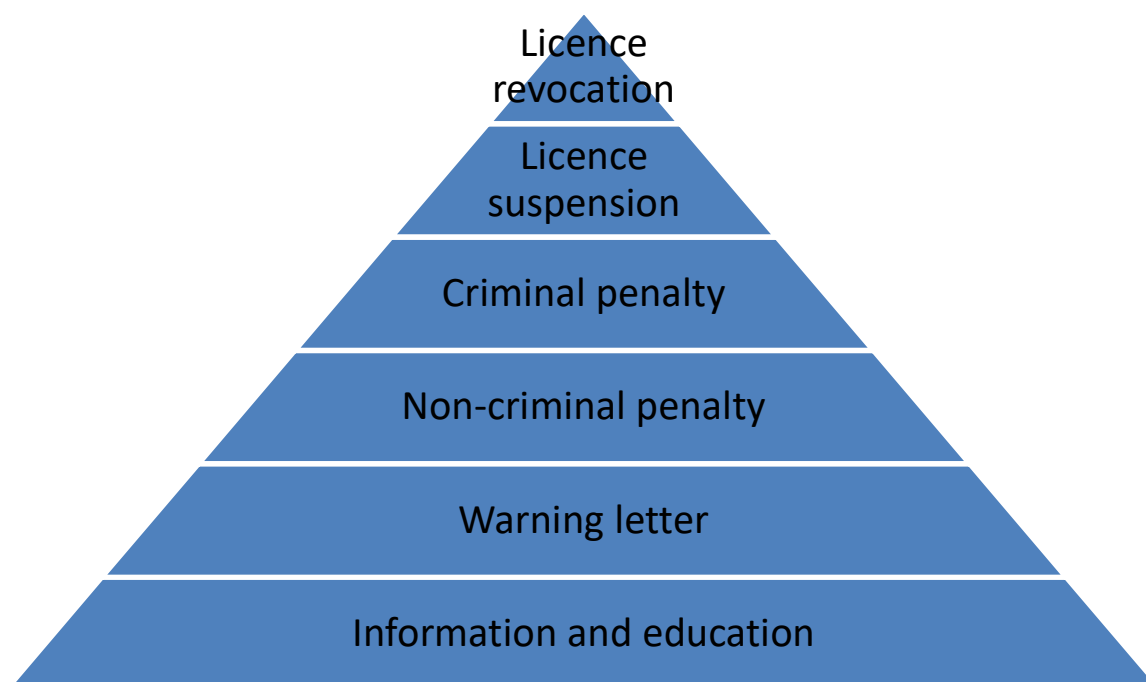
<sup>84</sup> Scholz, above n 9.

<sup>85</sup> Ayres and Braithwaite, above n 9, at 40.



regulation”,<sup>86</sup> may include persuasion and warning letters at the bottom, non-criminal penalties and criminal penalties in the middle, and licence suspension and revocation at the peak (see figure 1 below).<sup>87</sup>

Figure 1 – Example enforcement pyramid



Regulators should start by selecting an enforcement response from the bottom of the pyramid (say, information and education) but, in the event that the regulatee fails to comply, move up to increasingly punitive actions (for example, to a warning letter).<sup>88</sup> If this returns the regulatee to compliance, the regulator should move back down the pyramid; if not, the regulator should continue to escalate (for example, to a non-criminal penalty). Such a process will continue until the regulatee complies or is forced to stop operating by the most punitive response, licence revocation. Starting at the bottom of the pyramid provides one way of addressing the problem noted previously, that it is one thing knowing that members of the regulated industry have different motivations, but it is another predicting what drives each firm.

<sup>86</sup> John Braithwaite *Restorative justice & responsive regulation* (Oxford University Press, Oxford, 2002) at 73.

<sup>87</sup> Ayres and Braithwaite, above n 9, at 35.

<sup>88</sup> At 35-36. An alternative to “tit for tat” responsive regulation is “restorative justice” responsive regulation (Braithwaite, above n 86), where the regulator’s staff focus on persuasion and other lower level responses, and any escalation up the pyramid is attributed to the law, the legal system and the enforcement process: Vibeke Nielsen and Christine Parker “Testing responsive regulation in regulatory enforcement” (2009) 3(4) *Regulation and Governance* 376 at 382.

Responsive regulation has been very influential in shaping the approach taken by regulators internationally,<sup>89</sup> and is widely used in New Zealand,<sup>90</sup> but it has been criticised on (what have been called) policy/conceptual, practical and principled grounds.<sup>91</sup> Policy/conceptual concerns include that step-by-step escalation may not be appropriate (for instance, where a breach is potentially catastrophic), that it can be hard to move back down the pyramid as more punitive responses may have affected the regulator/regulated relationship, that it will be ill-suited for certain sectors or industries that do not respond to a “tit-for-tat” approach, and that the messages may get disrupted by third parties that are influencing the regulatory regime. In terms of practical issues, it will simply not be possible to engage in responsive regulation where there is a lack of repeat interactions between the regulator and regulated, or where the regulator has insufficient enforcement tools (for instance, a lack of intermediate sanctions or a severely punitive option). Finally, principled grounds of concern relate to a “lack of formalism” and an undermining of “both the rule of law and broader constitutional values”, as responsive regulation is so reliant on the regulator taking what action it considers appropriate in the circumstances, rather than acting consistently between regulated.<sup>92</sup> Related to this last concern, it has also been suggested that responsive regulation bifurcates the criminal justice system, with different approaches being taken to offending depending on whether it is the police or a regulatory agency enforcing the statute, rather than the seriousness of the offence.<sup>93</sup>

The limitations of responsive regulation suggest that it should mainly be used by regulators when dealing with large regulated with whom they have frequent contact.<sup>94</sup> For others, regulators may instead simply use the enforcement pyramid and do so in one of two ways. The first is in a ‘target-analytic’ manner, whereby the regulator selects the response to meet the type of regulated it is encountering.<sup>95</sup> The second involves the regulator applying the

---

<sup>89</sup> That “[e]nforcement should be based on ‘responsive regulation’ principles” is specifically endorsed by the Organisation for Economic Co-operation and Development as one of its 10 regulatory enforcement and inspections principles: Organisation for Economic Co-operation and Development *Regulatory Enforcement and Inspections* (OECD Best Practice Principles for Regulatory Policy, May 2014) at 33-36.

<sup>90</sup> New Zealand Productivity Commission, above n 51, at 57.

<sup>91</sup> Robert Baldwin and Julia Black “Really Responsive Regulation” (2008) 71(1) *Modern Law Review* 59 at 62-64.

<sup>92</sup> At 64. See also Jan Freigang “Scrutiny: Is Responsive Regulation Compatible with the Rule of Law?” (2002) 8(4) *European Public Law* 463 at 468.

<sup>93</sup> Andrew Ashworth “Is the Criminal Law a Lost Cause?” (2000) 116 *Law Quarterly Review* 225 at 251. Ashworth and Redmayne describe regulators as being “pervaded by a culture of diversion”: Andrew Ashworth and Mike Redmayne *The criminal process* (3rd ed, Oxford University Press, New York, 2005) at 144.

<sup>94</sup> Windholz, above n 39, at 236.

<sup>95</sup> Kagan and Scholz, above n 25.

enforcement measure that best matches the seriousness of the non-compliance and the regulatee's culpability.<sup>96</sup>

Two further developments in the literature are worth mentioning.<sup>97</sup> The first is the “smart regulation” model of Gunningham and Grabosky, which is a descendant of responsive regulation.<sup>98</sup> It is more “holistic than responsive regulation” and “emphasises the need to take regulation beyond the punitive pyramid and to think laterally where necessary – for instance by placing more emphasis on *ex ante* controls such as screening or considering whether resorting to non-state controls will work better than state sanctioning”.<sup>99</sup> Smart regulation relies on there being a number of regulatory instruments operating in a complementary or sequential manner,<sup>100</sup> and an enforcement pyramid with three faces, reflecting government, business as self-regulator and third parties (both commercial and non-commercial).<sup>101</sup> Regulators should still start at the bottom of the pyramid, but can escalate up any face of it.<sup>102</sup> However, a number of the concerns with responsive regulation apply equally to smart regulation, and it is more a theoretical model than one used in practice, with a 2011 survey of environmental regulators in the United States of America, the United Kingdom, Australia and the Netherlands finding that none applied it.<sup>103</sup>

The second development is Black and Baldwin's argument (again following on from responsive regulation) that regulators must in fact be “really responsive” and go beyond simply the attitudes or motivations of the regulatee.<sup>104</sup> This means being responsive “to the firms' own operating and cognitive frameworks (their ‘attitudinal settings’); to the broader institutional environment of the regulatory regime; to the different logics of regulatory tools and strategies; to the regime's own performance; and finally to changes in each of these elements”.<sup>105</sup> As with other modern strategies, it is about more than just enforcement, and should rather be applied across each regulatory activity (in the taxonomy they subscribe to,

---

<sup>96</sup> Windholz, above n 39, at 236. This was the approach envisaged in the United Kingdom regulatory sanctions review: see Richard Macrory “Sanctions and Safeguards: The Brave New World of Regulatory Enforcement” (2013) 66(1) Current Legal Problems 233 at 247.

<sup>97</sup> A third alternative, not discussed here, is Gunningham and Johnstone's ‘two-track’ model, whereby regulatees choose (or are placed) on either the “traditional regulation” track (albeit with modifications) or a systems-based track that encourages them to go beyond compliance and rewards them when they do: Gunningham and Johnstone, above n 49.

<sup>98</sup> Gunningham, Grabosky and Sinclair, above n 47.

<sup>99</sup> Baldwin and Black, above n 91, at 65.

<sup>100</sup> Gunningham, Grabosky and Sinclair, above n 47, at 387-391.

<sup>101</sup> At 398-399.

<sup>102</sup> At 398-399.

<sup>103</sup> Gunningham, above n 40.

<sup>104</sup> Baldwin and Black, above n 91.

<sup>105</sup> At 61.

these are detecting, responding, enforcing, assessing and modifying).<sup>106</sup> However, like smart regulation, it is very difficult to operationalise, and as such is perhaps something to “which regulators should aspire, but to which they should not unduly be held to account.”<sup>107</sup>

The message from this section is that, to meet the greater understanding of why people and businesses comply or do not comply with rules, a “regulatory orthodoxy” has developed that involves regulators using a risk-based approach to the question of where to intervene and a “responsive” style of intervention when deciding how to intervene.<sup>108</sup> Responsive styles favour starting with lower level measures and a process of escalation, using sanctions when other means have failed. They are, accordingly, still broadly within the “compliance family”, in that they promote working with the regulatee rather than against them, and are generally contrasted with deterrent strategies, which give a more prominent role to the early and frequent use of sanctions.<sup>109</sup> What is clear, however, is that on either an approach from the compliance family or a deterrence approach, sanctions have a role to play in enforcement.

#### *IV Sanctions*

While the word sanction can be used positively (for example, a reward for doing something),<sup>110</sup> it is used in this thesis in its more common “negative” sense of a penalty, imposed in response to a breach of a (legal) rule.<sup>111</sup> In this way, sanctions can be distinguished from two other types of enforcement response: compliance mechanisms and incapacitation measures.<sup>112</sup> These other types of response are discussed first, before moving on to the rationale for imposing sanctions.

---

<sup>106</sup> At 61.

<sup>107</sup> Windholz, above n 39, at 242.

<sup>108</sup> Paul Almond and Sarah Colover “Communication and Social Regulation: The Criminalization of Work-Related Death” (2012) 52(5) *The British Journal of Criminology* 997 at 1000. For a criticism of the “regulatory orthodoxy”, see Steve Tombs “Crisis, What Crisis? Regulation and the Academic Orthodoxy” (2015) 54(1) *The Howard Journal of Criminal Justice* 57.

<sup>109</sup> Although Tombs and Whyte have argued that the “regulatory orthodoxy” approaches are actually “a system of deterrence, based upon the assumption that most companies for most of the time will behave rationally, even if they need to be nudged externally to do so, in order to avoid more punitive, interventionist regulatory attention”: Steve Tombs and David Whyte “The Myths and Realities of Deterrence in Workplace Safety Regulation” (2013) 53(5) *The British Journal of Criminology* 746 at 752.

<sup>110</sup> For a discussion on different ways to consider sanctions, see Arie Freiberg “Reconceptualizing Sanctions” (1987) 25(2) *Criminology* 223.

<sup>111</sup> Compare Cooter: “A sanction is a detriment imposed for doing what is *forbidden*, such as failing to perform an obligation”: Robert Cooter “Prices and Sanctions” (1984) 84(6) *Columbia Law Review* 1523 at 1524 (his emphasis).

<sup>112</sup> This approach can be contrasted with that taken by other authors. For example, Abbot reviews all three types of enforcement response as “sanctions”: see Abbot, above n 3. This point is also referred to by Faure, who states “[a]s a note on terminology, in some legal systems those administrative remedies are primarily referred to

Compliance mechanisms typically require a non-complying regulatee to do, or not do, something, and their purpose is not to penalise but to bring the regulated party back into conformity with the law. An example can be found in s 101 of the Health and Safety at Work Act 2015, which provides that if an inspector reasonably believes that a person is contravening a provision of the Act, he or she may issue an improvement notice requiring the person to remedy the contravention. Should the recipient do so within the stated timeframe, no further action is taken. If not, the transgressor commits an offence and is *prima facie* liable to be sanctioned.<sup>113</sup>

Incapacitation measures, on the other hand, will force a non-complying regulatee to stop operating (either temporarily or permanently), but again their purpose is not to penalise, but rather to protect the public.<sup>114</sup> An example is s 122 of the Food Act 2014, which allows the Chief Executive of the Ministry for Primary Industries to suspend all or any specified part of a registered importer's operations in certain circumstances.<sup>115</sup> Again, breach of such a suspension is an offence and the transgressor will be liable to be sanctioned.<sup>116</sup> While compliance mechanisms are generally seen as a relatively low level enforcement response,<sup>117</sup> the effects of an incapacitation measure may well far exceed any sanction that would be imposed, and they are therefore thought to be the most extreme response a regulator can take.<sup>118</sup>

When the enforcement responses are viewed in this way, it may be better to think of not one, but three enforcement pyramids – compliance mechanisms, sanctions and incapacitation measures (see figure 2 below). The regulator can select from any pyramid (or pyramids),

---

as 'measures' for the reason that their primary goal is restoration or prevention of future harm and not inflicting intentional pain on a perpetrator with a view to deterrence. For the latter category, usually the terms 'sanction' or 'penalty' are reserved": Michael Faure "The Evolution of Environmental Criminal Law in Europe: A Comparative Analysis" in Andrew Farmer, Michael Faure, and Grazia Maria Veronica Vagliasindi (eds) *Environmental crime in Europe* (Hart Publishing, Oxford, 2017) at 299-300. He goes on to disregard the distinction, however, on the basis that (at 300) a measure may impose high costs and so have "a dissuasive effect, even though deterrence may not be its primary aim".

<sup>113</sup> Section 103.

<sup>114</sup> Of course, there may be other effects – for instance, imprisonment not only incapacitates, but can also deter: Anthony Ogus "Enforcing regulation: do we need the criminal law?" in Hans Sjögren and Göran Skogh (eds) *New perspectives on economic crime* (Edward Elgar Publishing, United Kingdom, 2004) at 51-52.

<sup>115</sup> These include if he or she considers that the food imported may pose a risk to human life or public health, or there is or has been a serious failure of operations, or there are or have been other matters that cast doubt on the safety and suitability of the food imported: s 122. The maximum period of suspension is 3 months (s 122(2)), although this can be extended for a further 3 months (s 123).

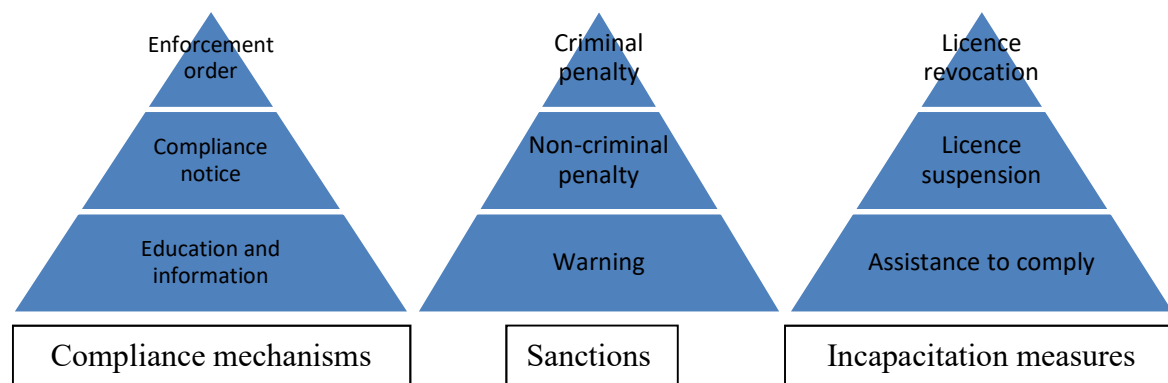
<sup>116</sup> Section 241(1)(a).

<sup>117</sup> Although some, such as an enforcement order under s 314 of the RMA (see Chapter 2), will be a higher-level measure.

<sup>118</sup> Ayres and Braithwaite, above n 9, at 35.

depending on its reasons for intervening, which reflects, among other things, the different circumstances of non-compliance and the transgressor's motivations.

Figure 2 – Three enforcement pyramids



Focussing in on sanctions, there are a number of different reasons why these might be imposed. These reasons include because it is deserved (what is known as desert theory), to act as a deterrent (both to the individual being penalised and to the wider regulated community), to provide reparation to those that have suffered losses, to rehabilitate the offender and to incapacitate.<sup>119</sup> However, as Yeung has noted, reparation, rehabilitation and incapacitation are generally not considered appropriate in regulatory matters,<sup>120</sup> and this is even more the case where compliance mechanisms (which are broadly rehabilitative but may also include a reparative element) and incapacitation measures already exist in the regime. This leaves desert and deterrence, with deterrence generally considered by regulatory scholars to be the primary purpose of imposing sanctions and criminal law theorists preferring desert.

### *A Deterrence Theory*

As just noted, deterrence as the primary rationale for imposing sanctions typically finds favour with regulatory scholars.<sup>121</sup> Indeed, as Yeung has observed:<sup>122</sup>

<sup>119</sup> While the first is a retributivist account, the other four are consequentialist, but other rationales exist such as non-consequentialist instrumentalism: for a discussion of these various accounts, and an example of the latter, see Victor Tadros *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford University Press, Oxford, 2011).

<sup>120</sup> See Yeung, above n 2, at 63.

<sup>121</sup> Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC R95, 2002) at 787; Abbot, above n 3, at 10.

<sup>122</sup> Karen Yeung "Quantifying regulatory penalties: Australian competition law penalties in perspective" (1999) 23(2) Melbourne University Law Review 440 at 461.

Because regulatory law's central concern is to modify behaviour by reference to its perceived undesirable effects on collective welfare, rather than to express moral condemnation of the offence, the theoretical justification for punishment of those who violate regulatory law appears to rest firmly on the deterrence theory of punishment.

Deterrence – “to prevent or discourage from acting, as by means of fear or doubt”<sup>123</sup> – has a long history, it being seen in the 18th century writings of Cesare Beccaria and Jeremy Bentham.<sup>124</sup> Along with other consequentialist theories, deterrence shares “the idea that punishment is justified by reference to its crime-prevention consequences and [is] advanced within a utilitarian framework.”<sup>125</sup> The traditional form of deterrence theory has three components – certainty, severity and celerity (swiftness) – as noted by Roberts and Ashworth:<sup>126</sup>

Penalties will deter offenders (or potential offenders), so the theory posits, to the extent that they are relatively certain to be imposed, sufficiently severe as to prove aversive and are imposed sufficiently soon after the offence occurs.

Deterrence is typically divided into specific (individual) and general. The aim of the former is to deter the particular offender that is being punished from offending again, while the aim of the latter is to deter other, would-be, offenders. As specific deterrence is not generally considered to be the goal of a regulatory sanctioning regime, the remainder of the discussion focusses on general deterrence.

There are a number of principled criticisms of deterrence – for instance, it would seem to have no issue with punishing an innocent person if it would deter many others,<sup>127</sup> and it treats

---

<sup>123</sup> Jon Silberman “Does Environmental Deterrence Work? Evidence and Experience says Yes, But We Need to Understand How and Why” (2000) 30(7) *The Environmental Law Reporter* 10523 at 10524, citing *The American Heritage Dictionary* (2nd College ed, 1982). Silberman goes on to note that:

It is a Latin root word, consisting of ‘de’ (away) + ‘terrere’ (to frighten). To frighten people away effectively, one must be strong, or in Latin, ‘fortis’, from whence is derived today’s enforcement”, defined as “to compel observance or obedience to something”. The end result is that the people “act in accordance with another’s command, request, rule, or wish”. This is the definition of “compliance”, derived from another Latin root, ‘complere’, to complete.

<sup>124</sup> Cesare Beccaria *On Crimes and Punishments* (1764); Jeremy Bentham *An introduction to the principles of morals and legislation* (1789). For a summary of their contributions, see Raymond Paternoster “How Much Do We Really Know About Criminal Deterrence?” (2010) 100(3) *The Journal of Criminal Law and Criminology* 765 at 767-773. See also, for issues with their theories, Alan Norrie *Crime, reason and history: a critical introduction to criminal law* (3rd ed, Cambridge University Press, Cambridge, 2014) at ch 2.

<sup>125</sup> Julian Roberts and Andrew Ashworth “Deterrence” in Andreas Von Hirsch, Andrew Ashworth, and Julian Roberts (eds) *Principled sentencing: readings on theory and policy* (3rd ed, Hart Publishing, Portland, 2009) at 39.

<sup>126</sup> At 40.

<sup>127</sup> As Hart notes, it is no defence to say this is not punishment, as it does not explain why we prefer to punish only those who have committed an offence: HLA Hart *Punishment and responsibility: essays in the philosophy of law* (Clarendon Press, Oxford, 1968) at 5-6.

people as a means to an end (the “means principle”)<sup>128</sup> – and it fell out of favour for a time. However, it became popular again in the middle of the 20th century, and it is often said that this began, at least with respect to regulatory sanctions, with Gary Becker’s 1968 article “Crime and Punishment: An Economic Approach”.<sup>129</sup> Becker’s model started from the position that people are rational beings who weigh up the benefits and costs of acting.<sup>130</sup> Therefore, if sanctions are to deter, their expected cost – the quantum of the penalty (“severity”) and the probability of having a penalty imposed (“certainty”) – must be greater than the expected benefit from offending.<sup>131</sup> In the remainder of this subsection the make-up of the expected costs side of the equation is discussed, as this is what the Government and/or regulator can influence in regards to a regulatory sanctions regime.<sup>132</sup>

Looking first at “severity”, there are a number of elements involved. The most obvious is the formal penalty that will be imposed, which in regulatory matters is typically a monetary impost. However, where it is a criminal offence and the offender is an individual, the sentence could be community-based (for example, community work, supervision, intensive supervision or community detention),<sup>133</sup> home detention or imprisonment. From an economic perspective, monetary penalties and non-monetary penalties are interchangeable, but the former are said to generally be preferable because they are less expensive to

---

<sup>128</sup> As Ashworth puts it, “[r]espect for the moral worth and autonomy of the individual means that citizens should not be regarded merely as numbers, to be aggregated in some calculation of overall social benefit”: Andrew Ashworth *Sentencing and criminal justice* (5th ed, Cambridge University Press, Cambridge, 2010) at 82. For a discussion of the means principle, and some possible exceptions to it, see Tadros, above n 119, at ch 6.

<sup>129</sup> Gary Becker “Crime and Punishment: An Economic Approach” (1968) 76(2) *Journal of Political Economy* 169.

<sup>130</sup> At 176. See also Richard Posner *Economic analysis of law* (7th ed, Wolters Kluwer, Austin, 2007) at 219; Robert Cooter and Thomas Ulen *Law & Economics* (5th ed, Pearson/Addison Wesley, Boston, 2008) at ch 11 and John Scholz “Enforcement Policy and Corporate Misconduct: The Changing Perspective of Deterrence Theory” (1997) 60(3) *Law and Contemporary Problems* 253 at 254.

<sup>131</sup> As with traditional deterrence theory, in some formulations of expected costs the delay between the commission of the act and when the penalty is imposed (what is commonly termed “celerity”) is also relevant, although in many others it is omitted from deterrence calculations (Paul Robinson and John Darley “Does Criminal Law Deter? A Behavioural Science Investigation ” (2004) 24(2) *Oxford Journal of Legal Studies* 173 at 182). This inconsistency in approach is likely to be because there is no consensus view on the impact of celerity. For instance, the effects of punishment on animals have been found to rapidly drop-off over time, and experimental work with humans has shown that people place less weight on consequences in the future (at 193-195). This suggests that the quicker a penalty is imposed, the more effect it will have. However, there is also evidence that people would prefer to be punished sooner rather than later (George Loewenstein “Anticipation and the Valuation of Delayed Consumption” (1987) 97(387) *The Economic Journal* 666), presumably so it is not “hanging over” them. Finally, some studies have found that perceived celerity of punishment has no impact (Daniel Nagin and Greg Pogarsky “Integrating celerity, impulsivity, and extra-legal sanction threats into a model of general deterrence: Theory and evidence” (2001) 39(4) *Criminology* 865). Given this uncertainty, it is not considered in this thesis.

<sup>132</sup> The Government/regulator can also influence the expected benefits and costs of alternatives to offending: see Posner, above n 130, at 219-220.

<sup>133</sup> Sentencing Act 2002, s 44(1).



impose.<sup>134</sup> For instance, a fine is a simple transfer of funds from the offender to the State (although the costs of recovering it need to be taken into account), whereas the non-monetary sentences require expenditure on staffing, equipment and infrastructure. However, the interchangeability of monetary and non-monetary penalties is not necessarily a view shared by the public.<sup>135</sup>

In more recent times, it has been recognised that severity goes beyond the formal penalty imposed and includes other monetary costs (for instance, legal expenditure in responding to a charge) and non-monetary costs (for instance, the inconvenience factor of being “hassled” by a regulator).<sup>136</sup> Further, individuals may want to avoid the shame of being caught breaking the law, and businesses can find there is an impact on profitability from negative publicity surrounding a court case.<sup>137</sup> Finally, where a person is subject to a criminal process there may be a stigma that does not necessarily attach to other proceedings.<sup>138</sup> The size of these “costs” will depend on a number of factors, such as the type of breach committed and how it is perceived by the offender and the public, and they can be far greater than any fine imposed.<sup>139</sup>

The “certainty” aspect of the expected cost also has a number of component parts. As noted when discussing enforcement, regulators will usually need to choose where to monitor (and accordingly where not to monitor) and how intensively, meaning many breaches will go undetected. Further, when a breach is identified, formal enforcement action does not follow as a matter of course. Finally, even if a regulator seeks to impose a sanction, it may not be proven. Therefore, it is more accurate to consider a number of probabilities that make up “certainty” – that the non-compliance is detected, that enforcement action is taken, and that this enforcement action results in a penalty.<sup>140</sup> Dividing the stages of enforcement up in this way also explains why, even if the probability of a penalty being imposed was zero (for

---

<sup>134</sup> Becker, above n 129, at 193.

<sup>135</sup> The same also applies within non-monetary penalties, the Court observing in *R v Conway* [2005] NZRMA 274 (CA) that (at [65]) there “is a world of difference in the minds of most members of the community, between a sentence of imprisonment and a sentence of community work”.

<sup>136</sup> Ogus and Abbot, above n 11, at 290.

<sup>137</sup> Richard Macrory *Regulatory Justice: Making Sanctions Effective* (2006) at 83.

<sup>138</sup> For example, Posner notes that a “fine is a more severe punishment than its dollar cost. Almost every criminal punishment imposes some non-pecuniary disutility in the form of a stigma, enhanced by such rules as forbidding a convicted criminal to vote”: Richard Posner “An Economic Theory of the Criminal Law” (1985) 85(6) *Columbia Law Review* 1193 at 1205.

<sup>139</sup> Baldwin, above n 67, at 371; Dorothy Thornton, Neil Gunningham and Robert Kagan “General Deterrence and Corporate Environmental Behavior” (2005) 27(2) *Law & Policy* 262 at 263-264; Shover and Routhe, above n 82, at 337-338.

<sup>140</sup> It could even be taken one step further, to the probability that the penalty is paid, but this is not considered in this thesis given the lack of data relating to this.

instance, if a “persuasive” compliance enforcement strategy was adopted) there may still be some deterrence, as regulatees will want to avoid the shame of being caught breaking the law even if they do not receive a formal sanction.<sup>141</sup>

Three additional points must be noted. First, the contribution to the expected costs calculation that is provided by the severity of the penalty and the certainty of detection, enforcement and imposition of a penalty are not necessarily equal. In particular, the certainty variables, and in particular the probability of detection, are often considered to be more important than the severity of the penalty.<sup>142</sup> This must be factored in when determining what the expected cost of an offence will be, although it is obviously impossible to be precise (for instance, it cannot be said that certainty is twice, or three times, or so on, as important as severity).

Second, the requirement that actors be rational – that is, have all the relevant information and weigh up the costs and benefits of offending – can be problematic. This is because, as noted earlier, a number of regulatees will be unaware of the rules and there are a number of reasons why people comply and do not comply. However, there are two responses to this. One is that, in most contexts the majority of regulatees are likely to be businesses, and therefore likely to have more information than individuals and a greater focus on weighing up costs and benefits.<sup>143</sup> The second is that actors are not required to possess “perfect rationality” for the theory to hold, with minimal or limited rationality being enough.<sup>144</sup> Put another way, regulatees need only be “sufficiently rational to be deterrable”, which is an easier standard to satisfy.<sup>145</sup>

---

<sup>141</sup> John Braithwaite and Toni Makkai “Testing an Expected Utility Model of Corporate Deterrence” (1991) 25(1) *Law & Society Review* 7 at 12.

<sup>142</sup> Becker, above n 129, at 176; RM Brown “Administrative and criminal penalties in the enforcement of occupational health and safety legislation” (1992) 30(3) *Osgoode Hall Law Journal* 691 at 703; Wayne Gray and John Scholz “Does Regulatory Enforcement Work? A Panel Analysis of OSHA Enforcement” (1993) 27(1) *Law & Society Review* 177. The relative contributions of certainty and severity to the deterrence equation can also be impacted on by risk preferences. For instance, risk-neutral actors will be indifferent to whether the change in expected cost comes from certainty or severity, risk-takers will be more influenced by a change in certainty, and someone who is risk-averse will be more influenced by severity: see Becker, above n 129, at 178.

<sup>143</sup> John Braithwaite and Gilbert Geis “On Theory and Action for Corporate Crime Control” (1982) 28(2) *Crime & Delinquency* 292 at 302; Edwin Sutherland *White collar crime: the uncut version* (Yale University Press, New Haven, 1983) at 236.

<sup>144</sup> Raymond Paternoster “Deterrence and Rational Choice Theories” in J Mitchell Miller (ed) *21st Century Criminology: A Reference Handbook* (1st ed, Sage Publications, Thousand Oaks, 2009).

<sup>145</sup> Posner, above n 138, at 1205.

Third, the reference to “expected” costs (and benefits) means that it is the perceived costs (and benefits), rather than the actual costs (and benefits), that are relevant.<sup>146</sup> This suggests that it is important that people are aware of actual penalties, how often they are imposed, and changes in these when they occur.<sup>147</sup> This could happen in a number of ways, including as a result of media reports, a regulator’s own publicity of enforcement action, or informally, such as during an inspection by an enforcement officer.<sup>148</sup>

Despite certainty generally being considered the more important of the two factors, deterrence theory can imply that the best approach is to impose very severe penalties sporadically (as opposed to minor penalties frequently).<sup>149</sup> This is because, as noted earlier, enforcement is expensive, meaning that it will be very costly to achieve high probabilities of detection, enforcement action and the imposition of a sanction, yet imposing increasingly severe penalties (especially monetary penalties) is relatively costless. However, there are good reasons why a regulator should be cautious about doing this. The prospect of legal errors means that regulatees will forgo activities that are at the borderline of legality, and this is magnified where the penalty is great.<sup>150</sup> Further, penalties that exceed the means of corporate defendants will flow through to the relatively blameless, such as employees, as the company may be forced to downsize or close.<sup>151</sup> Finally, penalties that do not reflect how serious the public sees an offence may undermine the legitimacy of a regulatory regime, and,

---

<sup>146</sup> Ogus and Abbot, above n 11, at 290.

<sup>147</sup> Paternoster, above n 124, at 804. The last of these is particularly critical if a regulator has introduced a new policy, such as more inspectors to increase the certainty of enforcement action, for without awareness of the changes there can be no additional deterrence: Andreas Von Hirsch and others *Criminal deterrence and sentence severity: an analysis of recent research* (Hart Publishing, Oxford, 1999) at 7.

<sup>148</sup> The focus on perceived, rather than actual, costs and benefits also means there is the possibility of misjudgement by regulatees: Anthony Heyes “Making Things Stick: Enforcement and Compliance” (1998) 14(4) *Oxford Review of Economic Policy* 50 at 59-61. On the one hand, regulatees may believe that there is a much lower chance of being caught offending and that the penalties imposed for a particular offence will be less than they in fact are. On the other hand, it also leaves open the possibility of “bluffing” – that regulators can make regulatees think that there is a greater prospect that offending will be detected or that penalties will be more severe than they actually are. Hawkins found that this was a popular tactic by enforcement officers, and that this and threats form a link between the available legal sanctions and enforcement behaviour: Hawkins, above n 8, at 154.

<sup>149</sup> A Mitchell Polinsky and Steven Shavell “The economic theory of public enforcement of law” (2000) 38(1) *Journal of Economic Literature* 45 at 53; Garoupa, above n 10, at 269.

<sup>150</sup> Posner, above n 138, at 1206; Yeung, above n 2, at 68.

<sup>151</sup> John C Coffee Jr “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment” (1981) 79 *Michigan Law Review* 386 at 386-407.

as noted above, deterrence already suffers from the criticism that it treats people as a means to an end.<sup>152</sup>

### *B Desert Theory*

In contrast to deterrence, desert theory is backward-looking, taking the view that penalties should be based on the offence committed, not on the consequences that will come from imposing the penalty. It has its origins in retributive philosophy and is popular among criminal law scholars, given its connections with morality and respect for individual autonomy.<sup>153</sup> Desert theory is appropriate to consider in regulatory sanctioning given the frequent use of criminal law processes to deal with non-compliance, although it has also been applied when a non-criminal process is used.<sup>154</sup> The purest form of desert theory proceeds on the basis that “we are justified in punishing because and only because offenders deserve it”,<sup>155</sup> but perhaps the most well-known version is that championed by Von Hirsch.<sup>156</sup>

Von Hirsch’s desert theory contains two key elements – censure and hard treatment. In terms of the former, desert is “an integral part of everyday judgments of praise and blame, which is institutionalised in state punishment to express disapprobation of the conduct and its perpetrators”.<sup>157</sup> In terms of the latter, this provides a prudential incentive not to offend, which is required because humans are moral beings, but fallible.<sup>158</sup> As Duff puts it, “In attaching sanctions to what it defines as crimes, [the criminal law] may also aim to deter from such conduct those who are insufficiently moved by its normative claims.”<sup>159</sup>

---

<sup>152</sup> Jack Bilmes and John Woodbury “Deterrence and Justice: Setting Civil Penalties in the Federal Trade Commission” (1991) 14 *Research in Law and Economics* 191 at 211; Yeung, above n 2, at 69; Abbot, above n 3, at 35-36.

<sup>153</sup> Different conceptions of the criminal law are considered in section V below.

<sup>154</sup> See the approach adopted in Yeung, above n 2, at ch 4.

<sup>155</sup> See, for example, Michael Moore “The Moral Worth of Retribution” in Andreas Von Hirsch, Andrew Ashworth, and Julian Roberts (eds) *Principled sentencing: readings on theory and policy* (3rd ed, Hart Publishing, Portland, 2009) at 110.

<sup>156</sup> See, for instance, Andreas Von Hirsch *Censure and sanctions* (Clarendon Press, New York, 1993) at ch 2.

<sup>157</sup> Andrew Ashworth “Desert” in Andreas Von Hirsch, Andrew Ashworth, and Julian Roberts (eds) *Principled sentencing: readings on theory and policy* (3rd ed, Hart Publishing, Portland, 2009) at 104. As Simester and Von Hirsch point out, “[o]rdinary language tends to distinguish *blame*, which expresses disapproval in everyday discourse, from *censure*, which generally involves authoritative expressions of disapproval”: AP Simester and Andreas Von Hirsch *Crimes, harms, and wrongs: on the principles of criminalisation* (Hart Publishing, Oxford, 2011) at 13 (their emphasis).

<sup>158</sup> Andreas Von Hirsch and Andrew Ashworth “The Justification for Punishment’s Existence: Censure and Prevention” in Andreas Von Hirsch and Andrew Ashworth (eds) *Proportionate sentencing: exploring the principles* (Oxford University Press, New York, 2005) at 23. As Von Hirsch and Ashworth put it, “[p]ersons, it is assumed, are neither like angels for whom purely normative appeals would suffice, nor like brutes which could be influenced only by threats.”

<sup>159</sup> RA Duff “Perversions and Subversions of Criminal Law” in RA Duff and others (eds) *The Boundaries of the Criminal Law* (Oxford University Press, New York, 2010) at 91.

Censure and hard treatment are intertwined. While hard treatment has a preventative function, it is also the vehicle by which the censure is conveyed. This means that proportionality is critical to desert theory. Because people are moral agents, who are expected to respond to the level of censure meted out to them, the penalty imposed must be proportionate to the seriousness of the offending. For instance, a penalty that is disproportionately severe, imposed for preventative reasons, would be unjust, as the offender would see themselves as receiving a greater amount of censure than they deserve. Proportionality is assessed both ordinally – that is, in terms of the relative seriousness of offences among themselves – and cardinally – that is, for each offence, the penalty should be in proportion to the gravity of the crime involved.<sup>160</sup>

As Ashworth concludes:<sup>161</sup>

The strengths of desert theory may be recognised in its basis in everyday conceptions of crime and punishment, in its close links with modern liberal political theory, in its insistence that state power be subject to limitations, in its model of individuals as autonomous, choosing beings, and in its protagonists' insistence that sentencing systems should have coherent aims and predictable sentences.

However, there are both practical and principled criticisms of desert theory. In terms of the former, it is hard to determine where offences that target very different conduct sit amongst one another in terms of relative seriousness, and even within an offence why a penalty of a certain size is appropriate.<sup>162</sup> This can mean that there is “considerable scope for inconsistency and the appearance of arbitrariness in setting penalty levels”.<sup>163</sup> In terms of the latter, the struggle has been, for pure desert theory, to explain why offending deserves a response and why this response should be punishment. For other versions of desert theory, the focus on choice by the defendant “ignores the social context of structural disadvantage in which many offenders act”.<sup>164</sup> Further, the lack of regard for consequences when imposing a sanction means that, even if a number of negative flow-on effects were to come, such a penalty would still be required.

---

<sup>160</sup> Ashworth, above n 128, at 89.

<sup>161</sup> Ashworth, above n 157, at 107.

<sup>162</sup> As Von Hirsch himself notes, the “amount of disapproval conveyed by penal sanctions is a convention”: Von Hirsch, above n 156, at 19.

<sup>163</sup> Yeung, above n 122, at 457.

<sup>164</sup> Lucia Zedner “Reparation and Retribution: Are They Reconcilable?” (1994) 57(2) *Modern Law Review* 228 at 230, citing Barbara Hudson, *Justice through Punishment: A Critique of the ‘Justice’ Model of Corrections* (Macmillan, Basingstoke, 1987).

## *V Using the Criminal Law*

Sanctions can be imposed using a variety of processes, which have traditionally been described as criminal, civil and administrative. However, as the Law Commission noted in its project on pecuniary penalties, saying that sanctions are being imposed “civilly” can be inappropriate, as:<sup>165</sup>

... the term “civil” relates to matters concerning citizens, and “civil law” is the branch of law ‘that deals with the resolution of legal issues between private parties. Pecuniary penalties do not arise in this context: like criminal offences, they arise within the field of public law, which concerns the relationship between the State and its citizens. Therefore, application of the term “civil” is liable to mislead.

Or as Yeung puts it:<sup>166</sup>

... the civil law paradigm is not primarily concerned with censuring the wrongdoer for morally blameworthy conduct. Its principal social function is typically to impose ‘obligations of repair’ on the wrongdoer, thus encompassing an obligation to pay compensation or restitution to the victim harmed by the wrongdoing. Although remedies within the civil paradigm may impose significant financial burdens on the wrongdoer, they are payable to the victim, not to the state, primarily to repair damage done, not to condemn the wrongdoer. Accordingly, they do not paradigmatically involve the punishment of the wrongdoer, nor are they associated with the degree of moral stigma typically accompanying a finding of criminal liability. Because the consequences of civil liability for the wrongdoer are considerably less serious than those associated with criminal wrongdoing, proof of culpability need not be insisted upon in defining the relevant standards of liability, and the procedural rights of the suspected wrongdoer are considerably weaker than those available to the criminal defendant.

Accordingly, the terminology used in this thesis to describe sanctioning processes is (so far as possible) criminal and non-criminal, with the latter covering what would traditionally have been called civil and administrative processes.<sup>167</sup> Because the RMA’s offences engage a

<sup>165</sup> Law Commission *Pecuniary Penalties: guidance for legislative design* (NZLC R133, 2014) at 36.

<sup>166</sup> Yeung, above n 2, at 250.

<sup>167</sup> Even between criminal and non-criminal the processes have become increasingly mixed. For instance, the United Kingdom has introduced, as an alternative to prosecution, fixed monetary penalties, which are formally called a “civil sanction” (Regulatory Enforcement and Sanctions Act 2008 (UK), s 36). However, these penalties can only be imposed where the criminal standard of proof is met and are issued directly by the regulator (s 39(2)), which was contrary to the recommendation from the Macrory review that the evidence should only have to meet the civil standard of proof (see Macrory, above n 137, at 3.34-3.35). It can be observed that Macrory himself now believes that the higher standard of proof was the more appropriate choice as the issue was never meeting the standard of proof, and this means that there will not be two standards of investigation. He does not know why the legislation opted for the phrase “civil penalty” when the review had consistently used the term ‘administrative penalty’: Richard Macrory *Regulation, Enforcement and Governance in Environmental Law* (2nd ed, Hart Publishing, Oxford, 2014) at ch 3 and n 43. It is difficult to see what makes this sanction “civil”. It is, perhaps, to make it clear to the public that it is not a criminal penalty, but terming it as such would have little impact on the courts as formal classification is only the starting point when considering whether a provision attracts the criminal law protections guaranteed by the European Convention on Human Rights (*Engel v Netherlands* (1979-80) 1 EHRR 647). Finally, for a discussion on whether such hybrid processes are a welcome movement see, for example, Kenneth Mann “Punitive Civil Sanctions: The

criminal process, it is necessary to consider the theory behind how the criminal law should be employed and applied. Before doing so, however, a preliminary question needs to be addressed of what the criminal law is.

The starting point is that the debate over whether deterrence or desert is the proper rationale for imposing sanctions has links to this question. For instance, consistent with the economic variant of deterrence theory is the view that the criminal law is “just another state regulatory tool”, its purpose being to “visit punishments such as imprisonment or fines in situations where other forms of disincentive make for an insufficient deterrent”.<sup>168</sup> At the other end of the spectrum, a pure desert theorist would suggest that the criminal law “exists *in order* to punish people for their culpable misconduct” and therefore “one should criminalise, and punish, *whenever* there is a culpable wrong, *and not otherwise*.”<sup>169</sup>

Criminal law scholars generally reject the former explanation of the criminal law. For instance, Duff has argued that the criminal law is “not simply one of the mechanisms available to governments for the control of behaviour, to be selected if and when it is likely to be a more efficient means to governmental ends.”<sup>170</sup> Or as Jareborg puts it, “the ambitions of the offensive approach” (as he labels it), whereby “[p]revention of harm or wrong-doing is the dominating perspective”, are “largely misguided, partly for reasons of principle but also because it is indefensible to try to reach important social goals with inadequate and costly means.”<sup>171</sup>

However, equally, many criminal law scholars would not go as far as the latter end of the spectrum, which is often called positive legal moralism. For instance, on Simester and Von

---

Middleground Between Criminal and Civil Law” (1992) 101(8) *The Yale Law Journal* 1795; John C Coffee Jr “Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It” (1992) 101(8) *The Yale Law Journal* 1875; Franklin Zimring “The Multiple Middlegrounds between Civil and Criminal Law” (1992) 101(8) *The Yale Law Journal* 1901; Paul Robinson “The criminal-civil distinction and the utility of desert” (1996) 76(1-2) *Boston University Law Review* 201; and Susan Klein “Redrawing the criminal-civil boundary” (1999) 2(2) *Buffalo Criminal Law Review* 679.

<sup>168</sup> Simester and Von Hirsch, above n 157, at 4, citing Posner, above n 138, as an example of such an approach. Even Posner, however, does not consider that (at 1194-1195) “efficiency is or ought to be the only social value considered by legislatures and courts in creating and interpreting the rules of the criminal law.”

<sup>169</sup> Simester and Von Hirsch, above n 157, at 4 (their emphasis), citing Michael Moore *Placing blame: a general theory of the criminal law* (Clarendon Press, Oxford, 1997) as an example of such an approach. They go on to note that even on such accounts what is in fact criminalised, however, is likely to be reduced once pragmatic considerations, for instance, are considered.

<sup>170</sup> RA Duff “Towards a Modest Legal Moralism” (2014) 8(1) *Criminal Law and Philosophy* 217 at 223.

<sup>171</sup> Nils Jareborg “What Kind of Criminal Law do we Want?” in Annika Snare (ed) *Beware of Punishment: On the Utility and Futility of Criminal Law* (Pax Forlag, Oslo, 1995) at 24-25 and 32-33.

Hirsch's account the criminal law "is a regulatory tool for influencing behaviour, and in some respects no more than that; but it is a special kind of tool".<sup>172</sup> In particular, it is:<sup>173</sup>

... distinctive because of its moral voice. It removes specified activities from the permissible and punishes individuals who venture or stray into its realm. It is a complex, authoritative, censoring device. Conduct is deemed through its criminalisation to be, and is subsequently punished as, *wrongful* behaviour that warrants blame.

This view, together with that of others such as Ashworth<sup>174</sup> and Duff,<sup>175</sup> has been labelled by Horder as "counter-reformation" thinking.<sup>176</sup> Horder contrasts this with the "reformation" view, which is process-driven and epitomised by Williams' famous statement that a crime is simply "an act that is capable of being followed by criminal proceedings, having one of the types of outcome (punishment etc) known to follow these proceedings".<sup>177</sup> In essence, "counter-reformation" thinking:<sup>178</sup>

...advocates a return to the idea that the criminal law ought to be employed to try people and punish them only for serious kinds of wrongdoing. In that regard, such thinking is strongly associated with the case for the confinement of criminal wrongdoing to wrongdoing accompanied by fault, and exemplified mainly by wrong actions rather than by culpable omissions (other than in exceptional cases). To these articles of faith should be added the claim that it should always be the state's burden, in criminal proceedings, to prove beyond reasonable doubt that such wrongdoing was committed by the defendant.

On such an approach, "a core element of criminal law, from a normative point of view, is that the criminal sanction should be reserved for substantial wrongdoing", the two "main dimensions" of which are "harm and culpability".<sup>179</sup> The touchstones of wrongs, harm and culpability, and the relationship between them, is, therefore, a useful framework for an analysis of when and how the criminal law should be employed in respect of regulatory breaches.<sup>180</sup> The next subsection starts with the employment of the criminal law generally

<sup>172</sup> Simester and Von Hirsch, above n 157, at 4.

<sup>173</sup> At 19 (their emphasis).

<sup>174</sup> Ashworth, above n 93.

<sup>175</sup> RA Duff *Answering for crime: responsibility and liability in the criminal law* (Hart Publishing, Oxford, 2007). His is positive legal moralism, but a more "modest" version than someone like Moore: see Duff, above n 170.

<sup>176</sup> Jeremy Horder "Bureaucratic 'Criminal' Law: Too Much of a Bad Thing?" in RA Duff and others (eds) *Criminalization: the political morality of the criminal law* (Oxford University Press, Oxford, 2014) at 101.

<sup>177</sup> Glanville Williams "The Definition of Crime" (1955) *Current Legal Problems* 107 at 123.

<sup>178</sup> Horder, above n 176, at 101.

<sup>179</sup> Ashworth, above n 93, at 240.

<sup>180</sup> But contrast Tadros, who considers that trying to use such touchstones is "likely to be highly indeterminate" and a better approach may be a comparative one, namely "whether criminalization is permissible given the alternatives available to us": Victor Tadros "Criminalization and Regulation" in RA Duff and others (eds) *The Boundaries of the Criminal Law* (Oxford University Press, New York, 2010) at 163. See also Horder, above n 176, for issues with the "counter-reformation" approach.



before looking at the specific challenges posed by a regulatory context, which as it transpires are often more to do with the manner in which the offences are drafted, rather than the employment of the criminal law per se.

### *A Employment of the Criminal Law*

Ashworth's formulation, referred to in the paragraph above, refers to wrongdoing by reference to harm and culpability. But before harm and culpability can be discussed, some points need to be made about the concept of "wrongdoing" itself. The first of these is that the criminal law is not concerned with all types of wrongs. For instance, private wrongs are generally considered the domain of the civil law, if they are to be regulated at all.<sup>181</sup> Rather, the criminal law is concerned with public wrongs, although this does not necessarily mean wrongs against the public (although in many instances these will be included). Instead, the criminal law is concerned with public wrongs in the sense that they are wrongs that "the community is responsible for punishing".<sup>182</sup> Duff and Marshall refer to this as "shared wrongs", justifying it as follows:<sup>183</sup>

...we share *in* the very wrong that [the victim] has suffered: it is not 'our' wrong *instead* of hers; it is 'our' wrong *because* it is a wrong done to her, as one of us-as a fellow member of our community whose identity and whose good is found within that community.

Referring to wrongdoing in terms of harm and culpability also introduces a second point, namely that wrongfulness is typically considered necessary, but not sufficient (in and of itself), to justify criminalisation.<sup>184</sup> Something else is required before criminalisation can be considered, and the most common "something else" is the Harm Principle.<sup>185</sup>

The Harm Principle has a long history, and its role and nature continue to evolve. It was first described by Mill in an exclusionary manner – "[t]he *only* purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent

---

<sup>181</sup> Indeed, some private wrongs, such as adultery, are typically not considered the domain of law at all.

<sup>182</sup> Grant Lamond "What Is a Crime?" (2007) 27(4) Oxford Journal of Legal Studies 609 at 614. See also Duff, above n 159, at 88-89.

<sup>183</sup> Sandra Marshall and RA Duff "Criminalization and Sharing Wrongs" (1998) 11(1) The Canadian Journal of Law and Jurisprudence 7 at 21 (their emphasis). For a recent defence of the idea that crimes can be understood as 'public wrongs', see RA Duff and Sandra Marshall "Crimes, Public Wrongs, and Civil Order" (2018) Criminal Law and Philosophy 1.

<sup>184</sup> On the other hand, a positive legal moralist considers wrongfulness to be necessary and sufficient: Duff, above n 170, at 222.

<sup>185</sup> Even with "something else" it will still only be "in principle" criminalisation as there may be various practical constraints that suggest that criminalisation is not "all things considered" appropriate: as to which, see Simester and Von Hirsch, above n 157, at ch 11.

harm to others”<sup>186</sup> – but in more recent times other reasons for criminalisation, such as that the conduct causes “offence to others” and paternalism (that is, the state using compulsion/coercion on individuals for their own purported good), have been considered acceptable.<sup>187</sup> In terms of the Harm Principle itself, it has also been expanded to include matters such as conduct that creates or causes the risk of harm to others,<sup>188</sup> where harm is the “thwarting, setting back, or defeating of an interest”.<sup>189</sup> For some theorists, such as Simester and Von Hirsch, it plays a major role,<sup>190</sup> while others consider it to be neither necessary nor sufficient,<sup>191</sup> or at most “a smaller part of a more developed armory of constraints to regulate the criminal law”.<sup>192</sup> Perhaps Ashworth and Zedner sum up the current state of affairs best when they observe that “[t]he harm principle remains central to the debate, but emphasis is now placed increasingly on the need to establish a wrong”.<sup>193</sup>

This leaves culpability. As Simester and Von Hirsch note, the need for wrongfulness is sometimes confused with the need for culpability elements, but both are in fact required if one is to be blamed.<sup>194</sup> For instance, a person can do something “wrong” (for instance push another person over), but not be culpable (for instance, because they fell by accident into the other person). Equally, one can perform an act culpably, but if it was not (a public) wrong in the first place then they are not eligible for blame.<sup>195</sup> The “centrality of the culpability requirement” to serious wrongdoing is said to be “surely part of the essence of the criminal law”,<sup>196</sup> and stems from the requirement of fairness, in that it is “not only unfair to censure

---

<sup>186</sup> John Stuart Mill *On Liberty* (1859) at 22 (emphasis added).

<sup>187</sup> See generally Simester and Von Hirsch, above n 157.

<sup>188</sup> Duff, above n 175, at 126. See also Jeremy Horder “Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation” in GR Sullivan and Ian Dennis (eds) *Seeking Security: Pre-Emptying the Commission of Criminal Harms* (Hart Publishing, Oxford, 2012).

<sup>189</sup> Joel Feinberg *Harm to Others* (Oxford University Press, Oxford, 1984) at 33.

<sup>190</sup> See, for example, Simester and Von Hirsch, above n 157, at chs 3 to 5.

<sup>191</sup> See, for example, Susan Dimock “Contractarian Criminal Law Theory and *Mala Prohibita* Offences” in RA Duff and others (eds) *Criminalization: the political morality of the criminal law* (Oxford University Press, Oxford, 2014) at 159-160.

<sup>192</sup> Victor Tadros “The Architecture of Criminalization” (2009) 28(1) *Criminal Justice Ethics* 74 at 74.

<sup>193</sup> Andrew Ashworth and Lucia Zedner “Prevention and Criminalization: Justifications and Limits” (2012) 15(4) *New Criminal Law Review: An International and Interdisciplinary Journal* 542 at 547-548. As Farmer notes, most theories either start with wrongfulness and have harm as a constraint, or start with harmfulness and have wrongfulness as a constraint: Lindsay Farmer “Criminal Law as an Institution: Rethinking Theoretical Approaches to Criminalization” in RA Duff and others (eds) *Criminalization: the political morality of the criminal law* (Oxford University Press, Oxford, 2014) at 82-83.

<sup>194</sup> Simester and Von Hirsch, above n 157, at 23. See also Douglas Husak *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, Oxford, 2008) at 76.

<sup>195</sup> Simester and Von Hirsch, above n 157, at 23-24.

<sup>196</sup> Ashworth, above n 93, at 240.

people who are not culpable, but also unfair to punish them for the offence”.<sup>197</sup> Indeed, as Sayre argued nearly 100 years ago:<sup>198</sup>

The moral obloquy and the social disgrace incident to criminal conviction are whips which lend effective power to the administration of criminal law. When the law begins to permit convictions for serious offenses of men who are morally innocent and free from fault, who may even be respected and useful members of the community, its restraining power becomes undermined. Once it becomes respectable to be convicted the vitality of the criminal law has been sapped.

Returning then to the quote of Ashworth that this section began with, the final aspect to discuss is his qualification that the wrongdoing be “substantial”. There are (at least) two different ways to consider this. One is from a purely practical perspective. Criminal justice processes are time-consuming and costly, and therefore should be reserved for conduct that is serious enough to justify this expense. But the “substantial” qualification can also, and more importantly, be seen as reflecting a “minimalist approach” to the question of criminalisation, which reflects “a) the principle of respect for human rights, b) the right not to be subjected to State punishment, c) the principle that the criminal law should not be invoked unless other techniques are inappropriate, and d) the principle that conduct should not be criminalized if the effects of doing so would be as bad as, or worse than, not doing so.”<sup>199</sup>

If the criminal law should be reserved for “substantial wrongdoing”, does this mean that it should not be used for regulatory breaches? This argument is sometimes made, on the basis that such breaches are often said to be “morally neutral”. But as Green notes, one must be clear as to what is meant by moral neutrality, as this can refer to a variety of things: that the conduct in question is not wrongful enough to criminalise, that the conduct is not harmful enough to justify using the criminal law, or that offenders who are not culpable are liable.<sup>200</sup> It is necessary, therefore, to return to the three concepts of wrongs, harmfulness and culpability and consider how, if at all, employing the criminal law for regulatory breaches can be justified.

Looking first at wrongs, it is sometimes said that regulatory breaches do not satisfy this criterion because the underlying conduct is *mala prohibita* – that is, the breaches are not

---

<sup>197</sup> Andrew Ashworth and Jeremy Horder *Principles of criminal law* (7th ed, Oxford University Press, Oxford, 2013) at 162.

<sup>198</sup> Francis Sayre “Public Welfare Offenses” (1933) 33(1) *Columbia Law Review* 55 at 79-80.

<sup>199</sup> Ashworth and Horder, above n 197, at 31-35.

<sup>200</sup> Stuart Green “Why it's a crime to tear the tag off a mattress: Overcriminalization and the moral content of regulatory offenses” (1997) 46(4) *Emory Law Journal* 1533 at 1537.

wrong prior to or independent of the law.<sup>201</sup> This is then contrasted with conduct that is *mala in se* (intrinsically wrongful or wrong in and of itself) and which is said to be the proper domain of the criminal law. However, establishing whether certain conduct is *mala prohibita* or *mala in se* is often difficult, given the differing values held both within and between societies. This is particularly the case when in some instances conduct that traditionally would have been considered “only regulatory” generates such public concern that it becomes “truly criminal”.<sup>202</sup> But even where the *mala prohibita* label is accurate this does not necessarily mean that the conduct is not sufficiently wrong to justify the employment of the criminal law.

This is because such offences can be supported on the basis that, so long as the regulatory rules are properly made and serve some societal good, it is a wrong to breach them.<sup>203</sup> Duff justifies this on the basis that it is part of our “civic duty” to comply with these rules,<sup>204</sup> while for Lamond it is wrong because to breach such rules shows “disrespect” for schemes of conduct that have the effect of co-ordinating risk reduction or the promotion of certain goods.<sup>205</sup> On the other hand, Simester and Von Hirsch consider such justifications unnecessary, arguing that “[i]f the state’s exercise of authority [in regulating  $\phi$ ing] was justified, then  $\phi$ ing is already wrongful and, post-legally, D ought not to do it”.<sup>206</sup> Whatever the rationale, the critical point, as Duff notes, is that the conduct must still be “*pre-criminally* wrongful”.<sup>207</sup> The conduct does not need to be wrongful independent of the law as a whole, but it must be wrongful before it is criminalised.

In terms of harm and culpability, employing the criminal law for regulatory breaches is sometimes questioned because conduct that does not cause actual (or even the risk of) harm, and that is committed unintentionally, is often criminalised. However, at the same time, some regulatory breaches are very harmful and are committed culpably, clearly justifying the

<sup>201</sup> Dimock, above n 191, at 151.

<sup>202</sup> Indeed, many offences that are referred to as *mala prohibita* are at least “hybrids” – they “involve a more or less artificial, stipulative determination of a genuine *malum in se*”: RA Duff “Crime, Prohibition, and Punishment” (2002) 19(2) *Journal of Applied Philosophy* 97 at 102. The term “hybrids” comes from Douglas Husak “*Malum Prohibitum and Retributivism*” in RA Duff and Stuart Green (eds) *Defining crimes: essays on the special part of the criminal law* (Oxford University Press, Oxford, 2005) at 75.

<sup>203</sup> Duff, above n 159, at 89. Contrast Husak, who considers that very few *mala prohibita* offences are appropriate: Husak, above n 194, at 103-119.

<sup>204</sup> Duff, above n 175, at 166-174.

<sup>205</sup> Lamond, above n 182, at 630.

<sup>206</sup> Simester and Von Hirsch, above n 157, at 28-29. Simester and Von Hirsch use the Greek symbol phi ( $\phi$ ) to “designate an (unspecified) action” (at 22). They observe that it is “used as conventional shorthand in the philosophical literature, in preference to alternatives such as ‘Xing’.”

<sup>207</sup> Duff, above n 170, at 219 (his emphasis). See also Ronald Dworkin *Taking rights seriously* (Harvard University Press, Cambridge, 1977) at 9.

use of the criminal law.<sup>208</sup> For instance, in modern times there would seem to be little doubt that the intentional dumping of toxic chemicals into an environmentally significant waterway is worthy of the term “criminal”. The issue with this latter case is that in criminalising such conduct the legislature often goes far further than is legitimate. In particular, it is common to find a very wide range of conduct criminalised in one offence, from cases where there is no harm (and no risk of harm), and which can be committed accidentally, up to significant actual harm caused intentionally, and so the issue here is actually with the drafting of the offences.

If the criminal sanction is properly reserved for substantial wrongdoing, assessed predominantly by reference to harm and culpability, then it follows that this should be reflected in the drafting of offences. In other words, a specific offence should only prohibit sufficiently harmful conduct (or conduct that risks harm) that is committed culpably.<sup>209</sup> In general, the need for harm is tracked by the *actus reus* and the need for culpability by the need for *mens rea*,<sup>210</sup> so it is worth considering the approach, in regulatory matters, to each of these matters.<sup>211</sup>

Starting with the *actus reus* of an offence, there is a tendency in regulatory matters to make this very broad. An element of this breadth is inescapable, in that it is not possible to specifically provide for every possible instance of harmful conduct. But, as noted above, the problem is that often little attempt is made to distinguish between harmful and non-harmful conduct, with all such behaviour included and the task of determining between the two left to the enforcer. Further, the tendency is always to expand (rather than contract) the *actus reus*, as governments become increasingly concerned that people might escape liability through a “loophole”.<sup>212</sup> This undoubtedly provides flexibility for the regulator, but where this is taken too far the offence will infringe the principle of legality, which holds that “the legislator

---

<sup>208</sup> Jareborg, above n 171, at 32. As he goes on to note, however, which is relevant for subsequent chapters in this thesis, “one should not expect that [criminalising these] will solve any problems, that it will make much difference to the crime rate, or that many offenders will be caught.”

<sup>209</sup> This is typically that the offence was committed intentionally, although in some instances recklessness will be sufficient: Ashworth, above n 93, at 241.

<sup>210</sup> AP Simester and others *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Hart Publishing, Oxford, 2013) at 18. However, as Simester and Smith point out, the harm requirement does not only go to the *actus reus* – for instance, the “difference between a legitimate offer or warning and an instance of blackmail is best understood in terms of the intentions and reasons of the defendant who delivers it”: AP Simester and ATH Smith “Criminalization and the Role of Theory” in AP Simester and ATH Smith (eds) *Harm and Culpability* (Clarendon Press, Oxford, 1996) at 6.

<sup>211</sup> These elements need to happen at the same time, the famous statement being the one made by Lord Kenyon CJ that it “is a principle of natural justice, and of our law, that *actus non facit reum nisi mens sit rea*. The intent and the act must both concur to constitute the crime...”: *Fowler v Padget* (1798) 7 Term Reports 509 at 514.

<sup>212</sup> Indeed, as Husak has observed more generally, “criminal statutes are easily enacted but seldom repealed”: Douglas Husak “The Criminal Law as Last Resort” (2004) 24(2) Oxford Journal of Legal Studies 207 at 209.

should prescribe the criminalised behaviour as precisely as possible”.<sup>213</sup> This principle exists for rule of law reasons: as Dicey noted, “a man may with us be punished for a breach of the law, but he can be punished for nothing else.”<sup>214</sup>

There is also a temptation in regulatory matters to eliminate the need for *mens rea* from an offence, thereby providing for liability without fault.<sup>215</sup> As Sullivan notes:<sup>216</sup>

Industrialization, and with it a burgeoning range of activities that required regulation, came to England and Wales before anything that could be described as an administrative state was in being. In the nineteenth century, much governance was local and an important part of that governance was the magistracy, a body that had long held regulatory as well as judicial functions. It followed that much of the regulation of industrial and commercial activity was devolved to magistrates and, thereby, the enforcement of regulations cast in strict form was through a criminal rather than an administrative law process.

However, this only explains why these strict liability rules were dealt with by the criminal law, as opposed to a different process. Norrie provides the explanation for why the regulatory laws needed to be cast in “strict” terms:<sup>217</sup>

There were two main reasons for this. The first and primary one was that the inspectors’ ability to prosecute factory owners with any degree of success was undermined by the need to attribute fault to these respected members of the community before a bench composed of their peers. Magistrates refused to convict their own kind of criminal offences. A second reason concerned the form of work organisation under the factory system. It was too easy for the owner to deny all knowledge of wrongdoing, particularly when he could show that the fault lay (as was often the case, at least in direct terms) with one of his employees who had, for example, subcontracted child labour outwith the terms of the law.

---

<sup>213</sup> Faure, above n 112, at 272. See also John Calvin Jefferies Jnr “Legality, Vagueness, and the Construction of Penal Statutes” (1985) 71(2) *Virginia Law Review* 189 at 190: “...a fuller statement of the legality ideal would be that it stands for the desirability in principle of advance legislative specification of criminal misconduct”.

<sup>214</sup> AV Dicey *Introduction to the study of the law of the constitution* (Liberty/Classics, Indianapolis, 1982) at 202.

<sup>215</sup> Indeed, the term “regulatory offence” is sometimes considered to be synonymous with liability without fault, but much care needs to be taken with this term. As Picinali notes, there are a number of different ways “regulatory offence” can be defined, including on evaluative grounds, based on its legal form, or, “counter-intuitively”, that “the distinctiveness of regulatory offences cannot reside in their regulatory nature”, given regulation (on some definitions) can include the criminal law: Federico Picinali “The Denial of Procedural Safeguards in Trials for Regulatory Offences: A Justification” (2017) 11(4) *Criminal Law and Philosophy* 681 at 683-684. As such, the term is avoided as much as possible in this thesis.

<sup>216</sup> GR Sullivan “Strict Liability for Criminal Offences in England and Wales Following Incorporation into English Law of the European Convention on Human Rights” in AP Simester (ed) *Appraising Strict Liability* (Oxford University Press, Oxford, 2005) at 201 (citations omitted). Sullivan also comments that (at 195) “[o]ne can imagine a counterfactual historical narrative where the resolute refusal of judges to entertain criminal liability without fault led to the creation of regimes of administrative regulation of industrial and other dangerous activities, regimes which did not culminate in an adversarial trial and were not dependent, at least in the first instance, on the imposition of fines and imprisonment.”

<sup>217</sup> Norrie, above n 124, at 107.

Although the reference is to “strict” liability in the two quotes above, in New Zealand common law liability without fault is typically divided into two forms – strict liability and absolute liability.<sup>218</sup> Strict liability means that the prosecution does not need to prove any mental element, but the defendant will be exculpated if it can show, on the balance of probabilities, a total absence of fault.<sup>219</sup> For absolute liability no such defence exists, and the rationale for differentiating between the two has been explained by Ramsay:<sup>220</sup>

Most of this law is addressed to those engaged in industrial and commercial activities, where the person whose will is the origin of the relevant actions is an entrepreneur or a corporation. Where liability allows for a defence of due diligence, a given industry standard is enforced. Where liability is absolute even meeting a given industry standard would be insufficient, and the law implicitly demands that participants seek continually to improve their safety standards.

In both strict liability and absolute liability offences, the provision will have been silent as to *mens rea*. However, a third option is for the statute to explicitly state that the prosecution does not need to prove intention. In these circumstances, the legislation will usually provide what defences are available, to the exclusion of the common law defence.<sup>221</sup>

Liability without fault is often justified based on its perceived instrumental benefits. For instance, Simester identifies five such arguments in favour of it: that the cost should, *prima facie*, be reduced because there are less elements for the prosecution to prove; that outcomes should be more accurate as there are less elements that could be decided wrongly; that it may assist with prosecuting companies, as there is no need to find a person whose state of mind can be attributed to the company; that it will increase the deterrent effect of the prohibition because people will take more care if they know they can be prosecuted without being at fault; and that it might be more efficient, in terms of allocating costs, than tort law.<sup>222</sup> However, he also goes on to note that at least some of these benefits can be overstated. For instance, in terms of cost and accuracy, culpability is still relevant to sentencing, and so the

---

<sup>218</sup> Such a distinction does not exist in the United Kingdom, although it has been recommended (see The United Kingdom Law Commission *Criminal Liability in Regulatory Contexts* (CP195, 2010)), and therefore texts from these countries use the term “strict liability” to refer to what would often be called “absolute liability” in New Zealand. Further, United Kingdom texts sometimes make a distinction between narrow strict liability, in that the offence contains no mental element at all, and broad strict liability, where it is only some element of the *actus reus* that does not have a corresponding *mens rea* element (see, for example, Lamond, above n 182, at 611-612). The narrow definition is used in this thesis.

<sup>219</sup> See *Civil Aviation Department v MacKenzie* [1983] NZLR 78 (CA) and *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA).

<sup>220</sup> Peter Ramsay “The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State” (2006) 69(1) *Modern Law Review* 29 at 49.

<sup>221</sup> See, for example, s 388 of the Building Act 2004.

<sup>222</sup> AP Simester “Is Strict Liability Always Wrong” in AP Simester (ed) *Appraising Strict Liability* (Oxford University Press, Oxford, 2005) at 25-30.

argument about it, and the cost and accuracy of the determination, may simply shift to a different stage in proceedings. It is also arguable that liability without fault may in fact be less of a deterrent, as the defendant, assuming it wants to remain in the industry and it is not cost-effective to reduce the chance of offending to zero, will be unaware what level of precaution to aim for.<sup>223</sup>

Further, the practical benefits do not detract from the point that, because of the centrality of culpability to the criminal law, liability without fault “is not to be welcomed, in general. It should be regarded as exceptional and in need of strong justification, particularly where the offence is serious”.<sup>224</sup> This position is, of course, tempered somewhat when there is a total absence of fault defence,<sup>225</sup> but where the defence instead comes from a statutory provision, its legitimacy will depend on the fairness of the defence(s) provided. Put another way, a defence that can only be relied on in extremely limited situations will mean that the offence is closer to absolute liability than strict liability, and engage all the attendant concerns that come with this.

There are also issues of fair labelling and fair warning if an offence has a broad *actus reus* and no *mens rea* requirement. In terms of fair labelling, if a range of harms (from major to minor or non-existent) and mental states (from intentional to accidental) are covered by one offence, it is difficult for the public to ascertain the relative seriousness of individual breaches.<sup>226</sup> Further, it may be unjust to the defendant, for instance if he or she is treated by members of the community as intentionally causing harm when his or her actions were accidental. In terms of fair warning, the long reach of regulation and the detailed nature of much of it means that it would be unwieldy to locate all the relevant information pertaining to the *actus reus* of the offence in primary legislation. This means that the public is expected to

---

<sup>223</sup> At 30-33.

<sup>224</sup> Andrew Ashworth and Lucia Zedner “Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions” (2008) 2 Criminal Law and Philosophy 21 at 31-33. See also Andrew Ashworth “Should Strict Criminal Liability be Removed from all Imprisonable Offences?” in Andrew Ashworth (ed) *Positive Obligations in Criminal Law* (Hart Publishing, Oxford, 2013).

<sup>225</sup> For instance, Duff has argued (Duff, above n 159, at 97):

There may be contexts in which it is legitimate to require the defendant to adduce evidence of lack of *mens rea*: for instance, when the activity in which she is engaged creates such material or moral dangers that she can reasonably be expected to bear an extra burden of care, and when the actualization of that danger can be said to constitute a presumptive wrong for which she should have to answer.

But see, for problems with reverse onus provisions: Andrew Ashworth “Four Threats to the Presumption of Innocence” (2006) 10(4) *The International Journal of Evidence & Proof* 241.

<sup>226</sup> See generally Simester and others, above n 210, at 31-32; James Chalmers and Fiona Leverick “Fair Labelling in Criminal Law” (2008) 71(2) *Modern Law Review* 217; Victor Tadros “Fair Labelling and Social Solidarity” in Lucia Zedner and Julian Roberts (eds) *Principles and values in criminal law and criminal justice: essays in honour of Andrew Ashworth* (Oxford University Press, Oxford, 2012).



be familiar with not only statutes of Parliament, but also the specific rules in secondary or tertiary legislation that populate the offences, which may not be realistic.<sup>227</sup> It could also be said that liability without fault arguably breaches fair warning, as “citizens may have no way of knowing or predicting when they might be about to incur criminal liability”.<sup>228</sup> However, as Simester goes on to point out, for the most part, such offences do give fair warning, in the sense that say “do not do X (even accidentally)”.<sup>229</sup> The issue here is therefore that one does not know whether, if they do X, they will be prosecuted, given the, at times, haphazard manner in which regulatory offences are applied. This is discussed next.

### *B Application of Offences*

A sensible starting point for a discussion on the application of offences is to recognise that those enforcing the criminal law have considerable discretion. This is broader than simply deciding whether or not to prosecute. If a prosecution is brought, there is also discretion as to who should be charged and for what. Further, there will also be discretion as to resolving a prosecution, in terms of whether to engage in plea bargaining (and the terms of any arrangement) or to invite the defendant to take part in a diversionary (that is, out of court) scheme. Indeed, such features have led Husak to conclude that where “power *really* is allocated in our criminal justice system today” is with “police and prosecutors”.<sup>230</sup> Or, as Stuntz puts it, “[l]egislative crime definition has a natural tendency to become, in practice, prosecutorial crime definition, as legislatures define broad nominal liability rules, leaving prosecutors to determine what behavior actually leads to conviction and punishment”.<sup>231</sup>

Discretion exists because New Zealand, like other cognate jurisdictions, subscribes to the ‘opportunity’ principle. This principle reflects that even where there is evidence that an offence has been committed, prosecutors have discretion as to whether or not to prosecute. Most famously, it was promoted by a former Attorney-General of the United Kingdom, Sir Hartley Shawcross QC, who in 1951 said that “[i]t has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution.” The opportunity principle is often contrasted with the “legality” principle, found in some European jurisdictions, where (in theory) the Police must report all offences to

---

<sup>227</sup> See generally Simester and others, above n 210, at 26-29.

<sup>228</sup> Simester, above n 222, at 38.

<sup>229</sup> At 38-39.

<sup>230</sup> Husak, above n 194, at 21 (his emphasis) (citations omitted).

<sup>231</sup> William J Stuntz “The Pathological Politics of Criminal Law” (2001) 100(3) Michigan Law Review 505 at 578.

the prosecutor who must in each case prosecute, although, in reality, systems that subscribe to the legality principle find ways around having to prosecute every offence.<sup>232</sup>

It is important, for rule of law reasons, that such discretion is used appropriately. That “like cases be decided alike, the law should apply equally to all, and decision-makers should adhere to procedural requirements of natural justice” are all fundamental aspects of the rule of law.<sup>233</sup> Indeed, one of Raz’s principles that can be derived from his idea of the rule of law is that “[t]he discretion of the crime-preventing agencies should not be allowed to pervert the law”.<sup>234</sup> However, as the drafting of offences becomes wider, as is commonly the case in regulatory matters (as discussed in the previous subsection), the greater this discretion will be and so the more that can go wrong. As Simester and Von Hirsch note, “[w]herever an offence is over-inclusive, so that it requires selective prosecution, the liability of defendants is, in effect, remaindered to the decisions of officials – creating the risk of unfair, inappropriate, or potentially even discriminatory prosecutions”.<sup>235</sup> There is also an increased risk of differential treatment when compared to non-regulatory statutes, with Ashworth and Redmayne noting:<sup>236</sup>

In principle, the criminal justice system should respond consistently and proportionately to alleged offenders in a way that reflects the amount of harm foreseeably done and their culpability, and this principle should apply across the boundaries between the many different enforcement agencies. Why should there be differences in response to someone who pollutes a river, someone who defrauds the Inland Revenue, someone who fails to take proper precautions for the safety of employees, someone who steals property from another, someone who sells unsound meat, and so on?

One way of ensuring that discretion is being used properly, and the public know what to expect from an enforcer, is by implementing constraints. As Beazley and Pulsford note, when discussing the related rule of law aspect of certainty, “[t]he law cannot be clear and predictable, and its operation certain, if the executive and the judiciary have a discretion at large to do as they please.”<sup>237</sup> In New Zealand, the primary constraint is the Solicitor-General’s Prosecution Guidelines.<sup>238</sup> These guidelines apply to public prosecutions and

---

<sup>232</sup> Andrew Sanders and Richard Young *Criminal justice* (3rd ed, Oxford University Press, Oxford, 2007) at 323-324.

<sup>233</sup> Philip Joseph *Constitutional and administrative law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 156.

<sup>234</sup> Joseph Raz *The authority of law: essays on law and morality* (Clarendon Press, Oxford, 1979) at 218.

<sup>235</sup> Simester and Von Hirsch, above n 157, at 206.

<sup>236</sup> Ashworth and Redmayne, above n 93, at 171.

<sup>237</sup> M Beazley and Myles Pulsford “Discretion and the rule of law in the criminal justice system” (2015) 89(3) *Australian Law Journal* 158 at 160.

<sup>238</sup> Crown Law Office *Solicitor-General's Prosecution Guidelines* (2013).

Crown prosecutions, which mean, respectively, “[a] prosecution for an offence that is commenced by or on behalf of the Crown, including a prosecution commenced by a Crown entity as defined in the Crown Entities Act 2004” and “[a] prosecution of a kind specified in the Crown Prosecution Regulations 2013, and which must be conducted by the Solicitor-General or a Crown prosecutor”.<sup>239</sup> This includes, therefore, most types of regulator, but not local authorities.<sup>240</sup>

The Guidelines set out the “Test for Prosecution”, which will only be met if:<sup>241</sup>

5.1.1 The evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction – the Evidential Test; and

5.1.2 Prosecution is required in the public interest – the Public Interest Test.

The discretionary aspect falls squarely into the Public Interest Test. The starting point is that there is a presumption that “the public interest requires prosecution where there has been a contravention of the criminal law”.<sup>242</sup> There then follows 18 factors in favour of prosecution, the predominant one being the seriousness of the offence, and 13 factors against prosecution, these factors being neither comprehensive nor exhaustive.<sup>243</sup> Specifically in regulatory matters, “relevant considerations will include an agency’s statutory objectives and enforcement priorities”, and in all cases cost is a relevant factor.<sup>244</sup>

Guidelines on how to exercise discretion do not guarantee that it will be used properly. As such, it is also important to identify when discretion has been used inappropriately, and this can be achieved by requiring those responsible for applying offences to account for their decisions. This includes not only decisions to prosecute, but also decisions not to prosecute.<sup>245</sup> Accountability – the “duty to give account for one’s actions to some other person or body” – can take a number of different forms, such as political, administrative, financial, legal and professional.<sup>246</sup> However, in a regulatory context it is sometimes said that political accountability is the most important, given the independence, and the significant

---

<sup>239</sup> At 3-4.

<sup>240</sup> Prosecutions brought by local authorities are also not private prosecutions: see Criminal Procedure Act 2011, s 5 definition of “private prosecution”. This point is returned to in chapters 5, 6 and 7.

<sup>241</sup> Crown Law Office, above n 238.

<sup>242</sup> At 5.7.

<sup>243</sup> At 5.8-5.10.

<sup>244</sup> At 5.10-5.11.

<sup>245</sup> RA Duff and others *Trial on Trial : Volume 3: Towards a Normative Theory of the Criminal Trial* (Hart Publishing, Oxford, 2007) at 189.

<sup>246</sup> Colin Scott “Accountability in the Regulatory State” (2000) 27(1) *Journal of Law and Society* 38 at 40.

impact, regulators can have.<sup>247</sup> Other forms of accountability for regulators include review from an independent inspectorate (for enforcement action generally), the Solicitor-General (for criminal proceedings generally) and from the courts (for prosecutions brought). Judicial review is a possibility where a prosecution is not brought or commenced and then discontinued, although the courts are wary about intervening in the exercise of prosecutorial discretion.<sup>248</sup>

Finally, it is sometimes said that, where there is an accountability gap, this can be filled by private prosecutions. These are, at least historically, “a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law.”<sup>249</sup> However, in modern times such prosecutions are rarely brought due to the money and energy required, meaning that this form of accountability is more apparent than real.<sup>250</sup> There are also specific challenges with private prosecutions in the regulatory context, chief among them being the (at times) technical nature of the evidence required, which may not be readily available to the public. Further, if there is no identifiable victim, as is often the case, then there may be no-one (other than the regulator) that knows about the breach or that has enough at stake to justify the time and expense that will be involved.

## *VI Conclusion*

This chapter has considered the three overlapping theoretical areas that the offences this thesis critiques fall within – regulatory compliance and enforcement, the imposition of sanctions and the use of the criminal law. Regulatory theory suggests that securing compliance with rules is a process and something that cannot be complete at all times. Rather, regulators need to understand the different reasons why regulatees comply, and do not comply, and pick where they will intervene and how. In recent times, this has generally meant identifying non-compliance using a risk-based approach and enforcing rules in a “responsive” (that is, escalating) manner, whereby sanctions are not a first resort (and are often a last resort), although there remains an alternative position that a deterrent, sanctions focussed, strategy is what is needed.

---

<sup>247</sup> Yeung, above n 2, at 39-40.

<sup>248</sup> For an example of a case in which the decision by the prosecutor to offer no evidence was successfully reviewed, and which is discussed in more detail in Chapter 6, see *Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447.

<sup>249</sup> *Gouriet v Union of Post Office Workers* [1978] AC 435 at 498.

<sup>250</sup> Sanders and Young, above n 232, at 379.

There are differing views between regulatory theorists and criminal scholars as to the proper rationale for imposing sanctions. The former argue that sanctions should be forward-looking and imposed to deter other would-be offenders from breaching the rules, with deterrence theory suggesting that this will happen when the expected cost of a penalty, which is made up of its severity and the probability it will be imposed, exceeds the expected benefit from offending. The latter argue that sanctions should be imposed because they are deserved, desert theory being backward-looking and suggesting that any penalties imposed should be proportionate to the seriousness of the offence.

Sanctions can be imposed using either a criminal or non-criminal process, but a “counter-reformation” school of thought has developed which suggests that the criminal law should be reserved for substantial wrongdoing, primarily assessed in terms of harm and culpability. However, this does not make the criminal law automatically inappropriate for regulatory breaches, as these can be sufficiently wrong, harmful and committed culpably. Rather, the issue in regulatory statutes is that, in the course of prohibiting seriously harmful and culpable conduct, there is a tendency for the *actus reus* of an offence to be drafted very broadly and the need for *mens rea* omitted, thus drawing in more minor transgressions. This approach to drafting also has implications for the application of offences, as wide offences means more discretion, and therefore an increased risk that this discretion will be used inappropriately. Constraints and accountability mechanisms are required to minimise this risk and correct any issues that materialise.

It will be apparent from this chapter that there is a marked difference between regulatory compliance and enforcement theory, which focusses on how regulators can best secure conformity with the rules of a regime, and criminal law theory, which focusses on the rights of those subject to offences (that is, in the context of regulation, the regulatees). There is, therefore, a tension when it comes to using criminal offences in regulatory statutes, and chapters 4 through 7, which form the core of this thesis, are fundamentally about whether this tension has been resolved in the RMA – are the offences effective and are they being used appropriately, such that they can be said to be working? The second limb of this enquiry (“appropriateness”) is the topic of chapters 6 and 7, and sits squarely in the theoretical area concerning the use of the criminal law. On the other hand, the first limb (“effectiveness”), which is covered in chapters 4 and 5, engages both the use of the criminal law and regulatory compliance and enforcement. Indeed, the starting point for the assessment into whether the RMA’s offences are effective is to ascertain the primary reason why penalties are sought and

imposed pursuant to the offences – is it to deter would-be offenders (as regulatory theorists argue), because they are deserved (as criminal scholars argue), or for some other reason? This is, accordingly, the initial task in the next chapter.

## Chapter 4 – Are the Offences Effective?

---

### *I Introduction*

The first limb of the research question is whether the RMA's offences are effective. However, as noted at the end of the previous chapter, the answer to this question will depend on the reason why offenders are being penalised, and there are different views held as to the proper rationale for this. On the one hand, because the RMA's offences are part of the criminal law, it may be that penalties are being sought and imposed because they are deserved. On the other hand, since the offences are also part of a regulatory regime, it could be that penalties are being sought and imposed to deter other, would-be, offenders. Indeed, it may even be that some other rationale for sanctioning has been adopted. This chapter begins, therefore, by considering in section II why RMA offenders are being penalised, finding that there is a strong emphasis placed on deterrence by both sentencing Judges and the local authorities.

If deterrence is the goal, then the effectiveness of the offences can be assessed by gauging their expected cost. This is because, as set out in Chapter 3, theory suggests that regulatees will be deterred if the expected cost of offending outweighs the expected benefit of doing so. If the expected cost is high, the offences will be a relatively good deterrent, as it will take a correspondingly high expected benefit from offending before a rational regulatee will breach the Act. On the other hand, if the expected cost is low, the offences will be a relatively poor deterrent, as it will only take a correspondingly low expected benefit before a rational regulatee will offend. The expected cost of the offences is made up of the quantum of the penalty ("severity") and the probability of having a penalty imposed ("certainty"), and these factors are therefore considered in sections III and IV (respectively). The overall argument advanced is that the penalties are of no more than moderate severity and there is a low certainty of imposition, so the offences have a minimal expected cost and are thus ineffective.

### *II Desert, Deterrence or Something Else?*

As just noted, the first task is to ascertain the reason why penalties are being sought (by local authorities) and imposed (by Environment Judges), as this will provide the goal against which the effectiveness of the Act's offences can be assessed. In this section, it is first argued that, despite early indications from the High Court that deterrence is not the only purpose of

sentencing RMA offenders, Environment Judges have seized on it as the primary rationale. It is then argued that, in a similar vein, despite national guidance from the Ministry for the Environment referring to both desert and deterrence, the local authorities (both individually and collectively) have also expressed a strong preference for deterrence.

### *A Environment Judges Favour Deterrence*

In determining the courts' rationale for imposing penalties, the natural point of departure is *Machinery Movers Ltd v Auckland Regional Council*, as it was the first RMA sentencing decision to reach the High Court on appeal.<sup>1</sup> In this case, the defendant had been sentenced to a penalty of \$25,000 for contravening s 15(1)(b) of the RMA, which was based, primarily, on the defendant's knowledge of the discharge, the actions or omissions at various stages by its director, the company's financial position and its efforts to mitigate or remedy matters since the incident.<sup>2</sup> Given the absence of any RMA-specific statutory sentencing principles, a full court was convened for the appeal to consider the proper approach to these cases.<sup>3</sup>

The Full Court drew a line under the sentencing decisions in the Water and Soil Conservation Act 1967 (the statute that previously regulated the offending conduct in this case) and noted that the RMA is "informed by a wholly different environmental philosophy, which places far greater emphasis on environmental protection and introduces a much more stringent regime of penalties and punishment".<sup>4</sup> It then stated that:<sup>5</sup>

An increase of one third in the maximum fine, the inclusion of imprisonment as a sentencing option, and the addition of director's liability signify an evident legislative dissatisfaction with the level of penalties imposed under the 1967 Act. In combination, these changes constitute a *clear legislative direction to the Courts to ensure that higher penalties are imposed which will have a significant deterrent quality*. If fines are too low, they will be regarded as a minor licence fee for offending and convey the idea that the law may be broken with relative impunity.

<sup>1</sup> *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 (HC).

<sup>2</sup> *Augustowicz v Machinery Movers Ltd* (1992) 2 NZRMA 209 (DC) at 217-218. Interestingly, given the importance this case has had, the first instance sentencing decision was only five paragraphs long and was delivered, as was common at the time, without written submissions and after standing the matter down for a short period following the substantive decision on liability.

<sup>3</sup> By way of contrast, s 274 of the Food Act 2014 provides that in addition to applying the Sentencing Act 2002 (subs (2)), and having regard to the orders available under ss 269 to 273 (subs (3)), the Judge in sentencing must take into account (a) how likely it was that a person would be harmed by the conduct constituting the offence; (b) how many people were likely to be harmed by the conduct constituting the offence; (c) how serious the harm was that was likely to be done by the conduct constituting the offence; and (d) whether there were potential or actual implications for trade, including international trade (subs (4)). See also s 151 of the Health and Safety at Work Act 2015 and s 254 of the Fisheries Act 1996.

<sup>4</sup> *Machinery Movers Ltd v Auckland Regional Council*, above n 1, at 499. Similar comments had been made about the change in the land regime from the Town and Country Planning Act 1977 to the RMA: see *Batchelor v Tauranga District Council (No 2)* [1993] 2 NZLR 84 (HC) at 86.

<sup>5</sup> *Machinery Movers Ltd v Auckland Regional Council*, above n 1, at 500 (emphasis added).



This quote suggests that there is clearly a role for deterrence in sentencing RMA offenders, but the Court then went on to note that other purposes of sentencing were relevant. In particular, the Judges observed that the “much wider sentencing powers given by the RMA...was a deliberate move to encourage a flexible and innovative approach to sentencing, which seeks not only to punish offenders but also to achieve economic and educative goals”.<sup>6</sup>

This would turn out to be consistent with the subsequent enactment of the Sentencing Act 2002, which provides a range of purposes for which a court “may sentence or otherwise deal with an offender”, including purposes closely linked to desert,<sup>7</sup> deterrence,<sup>8</sup> and other rationales.<sup>9</sup> However, in a decision issued shortly after the Sentencing Act 2002 came into force, the District Court noted that deterrence was – and remains – the primary reason for imposing penalties under the RMA.<sup>10</sup> In particular, Judge McElrea observed that:<sup>11</sup>

Consistent with the greater focus on environmental protection the cases show that deterrence is usually one of the uppermost factors in the mind of the Court in sentencing in environmental cases. The position has not been altered by the advent of the Sentencing Act 2002 which provides the Court with a number of alternative purposes and recognises that in different types of cases different purposes will be appropriate.

If anything, the focus by Environment Judges on deterrence as the primary purpose of sentencing RMA offenders has increased. For instance, in the 2016 case of *Waikato Regional Council v Rymanda Farms Ltd* the Court stated that “[t]he key sentencing principle required to be reflected in the starting point adopted is that of deterrence.”<sup>12</sup> This was a case involving the discharge of dairy farm effluent to land in circumstances where it may enter water, contrary to s 15(1)(b) of the RMA, and the harmful effects of such are well-known. However, deterrence has been said to be equally, if not more, applicable for cases where the harm is more indirect. For instance, in the 2017 case of *Tauranga City Council v Jacko Basil*

---

<sup>6</sup> At 501.

<sup>7</sup> For instance, holding the offender accountable for harm done to the victim and the community by the offending (s 7(1)(a)) and promoting in the offender a sense of responsibility for, and an acknowledgment of, that harm (s 7(1)(b)).

<sup>8</sup> Section 7(1)(f).

<sup>9</sup> For instance, protecting the community from the offender (s 7(1)(g)). Indeed, to further complicate matters, a court can adopt a combination of two or more of the purposes: s 7(1)(i).

<sup>10</sup> *Waitakere City Council v Gionis* DC Auckland CRN1090034293, 17 December 2002.

<sup>11</sup> At [32]. See also *R v Conway* [2005] NZRMA 274 (CA), where the Court of Appeal confirmed (at [60]) that the RMA and the Sentencing Act 2002 need to be applied “in harmony”.

<sup>12</sup> *Waikato Regional Council v Rymanda Farms Ltd* [2016] NZDC 15056 at [36]. It is probably more accurate to refer to this as the key sentencing “purpose”: see s 7 of the Sentencing Act 2002.

*Holdings Ltd*, where the charges involved the use of a property as two independent dwelling units in breach of the Tauranga City Plan, contrary to s 9(3) of the RMA, the Court stated:<sup>13</sup>

[17] The principles of the Sentencing Act also apply and in particular the key principle of deterrence has been identified in many cases as being the first and most important principle. This must be particularly true in respect of those offences which do not have direct environmental harm but represent wider policy goals for districts such as the density rule.

Finally, the primacy of deterrence can also be seen in the review that was undertaken for this thesis of the 2016/2017 sentencing decisions that were available. Of the 39 cases reviewed, where a purpose of sentencing was explicitly mentioned (in 27 of the cases), deterrence was always one of them.<sup>14</sup> Indeed, in 17 of these cases it was the only purpose mentioned.<sup>15</sup>

### *B Local Authorities Agree*

While judges impose sentences, and therefore have a significant role to play in the severity of the offences,<sup>16</sup> local authorities have the most influence when it comes to certainty, deciding how to monitor for breaches, when a breach will attract formal enforcement action and what action this will be.<sup>17</sup> Accordingly, it is necessary to also consider why local authorities say they are prosecuting.<sup>18</sup>

The starting point is the Best Practice Guidelines for Compliance, Monitoring and Enforcement under the Resource Management Act 1991, issued by the Ministry for the Environment in 2018.<sup>19</sup> These list the “two principal purposes of prosecutions” as being “to punish the offender and to deter potential reoffending by the offender or others”.<sup>20</sup> This is, it

---

<sup>13</sup> *Tauranga City Council v Jacko Basil Holdings Ltd* [2017] NZDC 3273. Again, deterrence is probably best referred to as a “purpose”, rather than a “principle”.

<sup>14</sup> In some instances, rather than explicitly mentioning a purpose or purposes of sentencing the Judge simply notes that he or she agrees with the submissions advanced by counsel: see, for example, *Otago Regional Council v Gibson* [2016] NZDC 14362 at [12].

<sup>15</sup> In ten cases denunciation was also referred to as a purpose of sentencing. In six of these cases holding the defendant accountable was included and one case also included promoting in the offender a sense of responsibility.

<sup>16</sup> Although, as will be argued in Chapter 5, local authorities also have a significant role in determining the severity of the offences.

<sup>17</sup> These points are all discussed in section IV below.

<sup>18</sup> As discussed in Chapter 5, whether local authorities in fact prosecute for their stated reasons is another matter.

<sup>19</sup> Ministry for the Environment *Best Practice Guidelines for Compliance, Monitoring and Enforcement under the Resource Management Act 1991* (2018).

<sup>20</sup> At 93. Before the Guidelines there was a RMA Enforcement Manual on the Quality Planning website, a partnership between the New Zealand Planning Institute, the Resource Management Law Association, Local Government New Zealand, the New Zealand Institute of Surveyors, the New Zealand Institute of Architects and the Ministry for the Environment, which stated that the “primary purpose of a penalty is to punish the offender and to deter future offending, not only by the offender, but in the community at large”, but then went on to say that “[p]rosecutions are better suited to deterrence due to the public nature of the proceedings and options available to the sentencing judge”: see Quality Planning *RMA Enforcement Manual - Imposing Penalties* at 2.

is suggested, somewhat confused, as it extols local authorities to pursue both desert and deterrence (and, in terms of the latter, both general and specific deterrence), although it could be read as these being the two principal purposes of prosecutions generally, of which local authorities should pick one in a particular case. The position is not made any clearer by the overall purposes of compliance, monitoring and enforcement set out in the Guidelines, which include to demonstrate “the consequences of non-compliance with the RMA and [provide] both general and specific deterrents, to prevent future offending”.<sup>21</sup>

Accordingly, the next step is to look at specific policies of local authorities, and these reveal that deterrence, rather than punishment (desert), is typically emphasised.<sup>22</sup> For instance, the Waikato Regional Council uses a “compliance pyramid” that has been adapted from Ayres and Braithwaite’s responsive regulation approach,<sup>23</sup> and which places “Prosecution” at the apex with the goal of “[g]eneral and specific deterrence”.<sup>24</sup> Similarly, the West Coast Regional Council has three factors that need to be considered when deciding whether or not to prosecute. These are the effect on the environment, the degree of culpability of the alleged offender and any other circumstances, which includes the “need for a deterrent”.<sup>25</sup> On the other hand, some councils, such as Environment Southland, do not give a specific purpose for prosecution,<sup>26</sup> although deterrence, and not punishment, features throughout its enforcement policy.<sup>27</sup>

---

<sup>21</sup> Ministry for the Environment, above n 19, at 12.

<sup>22</sup> An exception can be found in the Environment Canterbury *Compliance Monitoring and Enforcement Guidelines 2010*, which states that (at 5) the “fundamental objectives of a criminal prosecution” are “[t]o punish those who deserve punishment for their offences” and “[t]o protect the community and provide justice for victims of offending”. Environment Canterbury does, however, state (at 1) that “providing deterrence through appropriate penalties” is a desired outcome of compliance, monitoring and enforcement generally.

<sup>23</sup> Ian Ayres and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, New York, 1992).

<sup>24</sup> Waikato Regional Council *Enforcement Policy* (2016) at 11.

<sup>25</sup> West Coast Regional Council *Enforcement Policy* (2013) at 9. The other “circumstances” are the public interest and the likelihood the defendant will be discharged without conviction.

<sup>26</sup> Environment Southland *Compliance Policies* (2017) at 19.

<sup>27</sup> For instance, one of the matters Environment Southland considers when deciding on compliance or enforcement action is (at 17): “**A = Attitude/Ability to remedy.** Was the breach as a result of deliberate, negligent or careless action? What degree of due care was taken and how foreseeable was the incident? Was there any profit or benefit gained by alleged offender(s)? What efforts have been made to remedy or mitigate the adverse effects? What has been the effectiveness of those efforts? *Is there a need for a wider general deterrence required in respect of this activity or industry?* Is there a degree of specific deterrence required in relation to the alleged offender(s)?” (emphasis added).

Perhaps the strongest indication of council priorities comes from the framework developed by the Compliance and Enforcement Special Interest Group.<sup>28</sup> This Group is made up of 14 regional councils and unitary authorities, and together these local authorities account for the vast majority of all RMA prosecutions undertaken.<sup>29</sup> The framework it has developed emphasises maximising deterrence in its “[p]rinciples to guide compliance operations” and specifically references deterrence (and no other purposes) when setting out the relevant factors, over and above those that generally guide enforcement decision making, if prosecution is being considered.<sup>30</sup>

Finally, there is no indication that local authorities are increasingly favouring desert when they come to update their enforcement policies, despite the mixed approach set out in the Ministry for the Environment’s 2018 Guidelines. For instance, the Marlborough District Council’s Enforcement Policy, which was published after the Guidelines were issued, is in a similar vein to Waikato Regional Council’s Enforcement Policy, adopting the compliance pyramid with prosecution at the top and with the goal of “[g]eneral and specific deterrence”.<sup>31</sup> It is suggested that this is likely to remain the case, at least until the Guidelines are made more directive, these only currently providing “advice” on how local authorities should exercise their discretion “to achieve the purpose of the RMA”.<sup>32</sup>

That deterrence is the primary rationale for sentencing and prosecuting is understandable, given that this was the only purpose emphasised in the Explanatory Note to the Resource Management Bill.<sup>33</sup> However, there is a rider to this. There are likely to be specific cases where other reasons (mainly desert) carry more weight.<sup>34</sup> However, such cases are sufficiently rare that critiquing the effectiveness of the offences using deterrence theory will not be unduly distorted by them.

---

<sup>28</sup> Compliance and Enforcement Special Interest Group *Regional Sector Strategic Compliance Framework 2016-2018*. To be more accurate, it is likely that the framework represents the enforcement policies of one or more of the most active councils, and this has then been adopted by other councils.

<sup>29</sup> For instance, in 2016/2017 regional councils and unitary authorities brought 65 of the 71 prosecutions initiated: Ministry for the Environment *National Monitoring System for 2016/17* (2018).

<sup>30</sup> Compliance and Enforcement Special Interest Group, above n 28, at 9 and 14 (respectively).

<sup>31</sup> Marlborough District Council *Enforcement Policy* (2018) at 17.

<sup>32</sup> Ministry for the Environment, above n 19, at 9.

<sup>33</sup> Resource Management Bill 1989 (224-1) (explanatory note) at xi.

<sup>34</sup> For instance, the 2018 prosecutions of Augustine Lau, which involved serious, repetitive and intentional offending, would appear to be a prime example of this: see *R v Lau* [2018] NZDC 1133 (appeal against sentence dismissed: *Lau v R* [2018] NZCA 151); *R v Lau* DC Auckland CRI-2006-004-010786, 10 July 2018 (appeal against sentence dismissed: *R v Lau* [2018] NZHC 2935).

### *III No More than Moderate Severity*

If deterrence is the goal, then the effectiveness of the offences can be gauged by assessing their expected cost, and the first aspect of this is the severity of the penalties imposed. As noted in Chapter 2, there are several different types of formal penalty, both monetary and non-monetary, that can be imposed for breaching the RMA. Natural and non-natural persons are subject to a maximum fine of, respectively, \$300,000 and \$600,000.<sup>35</sup> Natural persons are also liable to imprisonment for a term not exceeding 2 years, which triggers the possibility (under the Sentencing Act 2002) of home detention and community-based sentences as alternatives.<sup>36</sup> For both natural and non-natural persons, the Court can also, or instead, make an enforcement order under s 314 of the RMA or order a consent authority to review the defendant's resource consent (if the offence involves an act or omission that contravenes the consent),<sup>37</sup> the latter of which can result in the cancellation of the consent if "there are significant adverse effects on the environment resulting from the exercise of the consent".<sup>38</sup> The last formal penalty is the conviction, which will be imposed on guilty defendants unless they are discharged without conviction under s 106 of the Sentencing Act 2002. Finally, as noted in Chapter 3, the severity of a sanction includes any informal penalties, again both monetary and non-monetary, felt by the recipient. All of these penalties must be taken into account, although as one moves further up the hierarchy of sentences and into the informal penalties it becomes harder to assess the impact, given the severity becomes increasingly dependent on the specific circumstances of the offender.

In this section, it is first argued that fines are, by some distance, the prevailing penalty imposed in response to RMA offending, but that, despite gradual increases, they remain on average only modest. It is then argued that the more stringent options of imprisonment and other non-monetary penalties (for individuals), and "punitive" enforcement orders and reviews of resource consents (for both natural and non-natural persons), are imposed rarely. Finally, it is suggested that "secondary" penalties – the consequences of a conviction and informal sanctions – tend to provide little bolstering to the "primary" penalty, as these are of

---

<sup>35</sup> RMA, s 339(1). Before the reforms in the Resource Management (Simplifying and Streamlining) Amendment Act 2009, the maximum monetary penalty (for both natural and non-natural persons) was a fine not exceeding \$200,000.

<sup>36</sup> Section 339(4) of the RMA also provides explicitly that "A court may sentence any person who commits an offence against this Act to a sentence of community work, and the provisions of Part 2 of the Sentencing Act 2002, with all necessary modifications, apply accordingly."

<sup>37</sup> RMA, s 339(5).

<sup>38</sup> Section 132(4).

low and variable impact (respectively). Taken together, this means that the offences are of no more than moderate severity.

### *A Fines the Most Popular Sentence, but Only Modest Levels*

The fine has been, and remains, by far the most common penalty imposed by the courts for RMA offending.<sup>39</sup> For instance, it would appear that, between 1 October 1991 and 30 September 2012, at least 80%, and potentially 90% or more, of successful prosecutions resulted in a fine.<sup>40</sup> Since then, other than in 2013/2014 when fines accounted for 82% of the “sentences recorded”, the percentage of fines imposed in successful prosecutions has been greater than 90%.<sup>41</sup> Indeed, in the final year of quantitative data considered in this thesis, 2016/2017, no sentence other than a fine was recorded as having been imposed.<sup>42</sup>

Fines can range from the significant to the minimal. For instance, in terms of the former, the highest fine imposed under the RMA was in *Maritime New Zealand v Daina Shipping Company*.<sup>43</sup> In this case, which related to the grounding of the *Rena* and which was described as “New Zealand’s worst maritime environmental disaster”,<sup>44</sup> a fine of \$300,000 (half the maximum penalty of \$600,000) was imposed for the discharge of “hundreds of tonnes of oil” and “hundreds of containers and their contents, including dangerous goods,” into the ocean.<sup>45</sup> In recent years, other fines approaching this level have also been imposed.<sup>46</sup> However, at the same time, fines of as little as \$5,000 were still being imposed in

---

<sup>39</sup> The same is the case in many countries overseas, including the United States of America, the United Kingdom, Belgium, Canada and Australia: see Rob White “Reparative justice, environmental crime and penalties for the powerful” (2017) 67(2) *Crime, Law and Social Change* 117 at 129. In some jurisdictions it is not uncommon for a fine to be coupled with imprisonment – for instance, in Belgium between 2003 and 2007 approximately 10% of individuals convicted of environmental offences were sentenced to imprisonment and a fine, with the average length of the former between 4.4 months and 6.2 months (depending on whether it was imposed at first instance or on appeal): see Carole Billiet, Thomas Blondiau and Sandra Rousseau “Punishing environmental crimes: An empirical study from lower courts to the court of appeal” (2014) 8(4) *Regulation & Governance* 472 at 478.

<sup>40</sup> The prosecution studies record the number of cases considered, the percentage of these that resulted in a conviction and the number of sentences other than fines, so it is possible to estimate (but not confirm) the number of successful cases that resulted in a fine: see, for example, Ministry for the Environment *A study into the use of prosecutions under the Resource Management Act 1991: 1 July 2008 - 30 September 2012* (October 2013) at 7.

<sup>41</sup> Letter from Ministry of Justice to Mark Wright regarding Official Information Act 1982 request (23 February 2018) at Appendix 1.

<sup>42</sup> There were, however, 23 instances of “[n]o sentence recorded”: at Appendix 1. “No sentence recorded” includes “where an offender has been convicted and discharged and where an offender has been ordered to pay court costs”.

<sup>43</sup> *Maritime New Zealand v Daina Shipping Company* DC Tauranga CRI-2012-070-1872, 26 October 2012.

<sup>44</sup> At [2].

<sup>45</sup> At Endnote ii.

<sup>46</sup> See, for example, *Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd* [2016] NZDC 8903 (\$288,000).

2016/2017,<sup>47</sup> with a number of other fines under \$10,000,<sup>48</sup> \$15,000<sup>49</sup> and \$20,000 also imposed that year.<sup>50</sup>

Another way to look at fine levels is to consider the average fine per prosecution. This is preferable to considering the average fine per charge, as, in the usual course of events, the fine reflects the offending rather than the number of charges the defendant is convicted of. Average fine per prosecution is also preferable to the average fine per defendant, as where the defendants are “one and the same for practical fiscal purposes...the total penalty imposed must be tailored accordingly”,<sup>51</sup> which typically means dividing the one penalty between the defendants.<sup>52</sup> Put another way, whether one defendant is convicted of one charge or five (related) defendants are convicted of five charges each, if the offending is the same then the total penalty imposed in each case should be the same.

Average fines per prosecution is also the approach taken in the prosecution studies (which cover the period 1 October 1991 to 30 September 2012), and these show a steady increase since the RMA was enacted. In the first study (1 October 1991 to 30 June 2001) the average fine per prosecution was \$6,500, in the second study (1 July 2001 to 30 April 2005) it was \$8,167, in the third study (1 May 2005 to 30 June 2008) it was \$12,463, and in the fourth study (1 July 2008 to 30 September 2012) it was \$21,622.<sup>53</sup> It was during the period covered in the fourth study that the maximum penalty for RMA offending increased from \$200,000 to the split penalty of \$300,000 for natural persons and \$600,000 for non-natural persons.<sup>54</sup> The study notes that during this period, and excluding cases where the Court considered the defendant to be of “poor” financial standing or that the offending was “accidental”, the average total fine before the increase was \$19,789 per prosecution, and after the increase it was \$28,792 per prosecution.<sup>55</sup>

---

<sup>47</sup> *Hawkes Bay Regional Council v Cavell* [2017] NZDC 12180.

<sup>48</sup> See, for example, *Tasman District Council v Mytton* [2017] NZDC 9820 (\$8,000).

<sup>49</sup> See, for example, *Auckland Regional Council v Motukaha Investments Ltd* [2016] NZDC 14078 (\$11,250).

<sup>50</sup> See, for example, *Southland Regional Council v Gladvale Farms Ltd* [2017] NZDC 11464 (\$18,750).

<sup>51</sup> *Kiwi Drilling Company Ltd v R* (1997) 4 ELRNZ 23 (CA) at 28.

<sup>52</sup> See, for example, *Hardegger v Southland Regional Council* [2017] NZHC 469.

<sup>53</sup> Ministry for the Environment, above n 40, at 22. The studies refer to this as the “average total fine”.

<sup>54</sup> The increase took effect from 1 October 2009: see Resource Management (Simplifying and Streamlining) Amendment Act 2009, s 2. The reason for the increase appears to have been deterrence – for instance, the Cabinet Papers refer to one of the “Issues” to be solved as being that “[t]here is little incentive for offenders to comply with the RMA and plans when the financial gains to be made from non compliance are higher than the penalties imposed”: see Cabinet Paper *Reform of the Resource Management Act 1991: Phase One Proposals* (2009) at 24.

<sup>55</sup> Ministry for the Environment, above n 40, at 21. The report excludes cases that involve one or both of these factors because they are the “two main reasons for reduction of fine” and excluding them gives a “more accurate

There is no data as to the average fine per prosecution since 30 September 2012, but an analysis of the sentencing decisions available for 2016/2017 shows that it has continued to increase. In the 38 (out of the 39 available) cases where the primary penalty was a fine,<sup>56</sup> the average fine per prosecution was \$36,268.<sup>57</sup> On the most generous interpretation – that is, one natural person defendant – this amounts to 12.1% of the maximum penalty of \$300,000, with this percentage steadily decreasing where the prosecution involved multiple defendants (which means the penalty will likely have been divided between them) and/or non-natural defendants (which increases the maximum penalty on each charge to \$600,000) and/or continuing offences (whereby the Court can impose an additional penalty of up to \$10,000 for every day or part of a day during which the offence continues).<sup>58</sup> While it is true that, in the usual course, “the maximum penalty, being reserved for the worst class of case in the offence category, is of only indirect and sometimes marginal relevance to day-to-day sentencing”,<sup>59</sup> in RMA sentencing (and regulatory offending more generally), where prosecution is typically reserved for the most serious offending, it takes on greater importance.<sup>60</sup> This last point is returned to in the next chapter, but for now it suffices to conclude that, although fine levels are increasing, they are still relatively modest.

---

picture”. However, it is not clear why this makes it more accurate, as there is no suggestion that the courts do not recognise the increase in maximum penalty when these factors apply. Regardless, this level of increase following the legislative change in is line with the courts’ general position that the raising of the maximum penalty must be realised, but not on a direct percentage basis (which would have involved increasing starting points by a factor of between 1.5 and 3, depending on the proportion of natural and non-natural defendants prosecuted). While it was initially suggested that a direct percentage increase, or something close to it, may happen (see *Canterbury Regional Council v B J Dakin & Company Ltd* DC Christchurch CRI-2010-009-7053, 10 June 2010 at [16]), the courts subsequently retreated from that position (see, for example, *Waikato Regional Council v Wyebrook Farms Ltd* DC Hamilton CRN-12-0725-35/36, 25 June 2012 at [27]; *Canterbury Regional Council v PGG Wrightson Ltd* DC Christchurch CRI-2012-009-11971, 28 March 2013 at [28]-[29]). For a recent discussion on the effect of increasing the maximum penalty, in the context of health and safety offending, see *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881 at [47]-[54].

<sup>56</sup> In the other case the defendant was discharged without conviction, on the basis that he agreed to an enforcement order requiring the payment of remediation work (\$9,648.50) and the payment of the council’s costs (\$9,000), that he apologised to his neighbour and the council, and that he paid \$3,500 to charity: see *Auckland Council v Fitzgerald* [2016] NZDC 13692.

<sup>57</sup> For the purposes of this exercise, a prosecution has been defined as a sentencing case, so if unrelated co-defendants were sentenced separately then these have been counted as different prosecutions. Two sentences were successfully appealed (*Hardegger v Southland Regional Council*, above n 52, and *Waslander v Southland Regional Council* [2017] NZHC 2699), but the changes in fine have not been incorporated into these calculations. It can be observed that the average fine per defendant (of which there were 54) was \$25,522, with the average fine per non-natural person being \$29,912 and the average fine per natural person being \$19,138, but caution should be exercised when considering these figures for the reasons already outlined. In particular, where multiple related defendants are included in a prosecution, the average fine per defendant will decrease.

<sup>58</sup> RMA, s 339(1A).

<sup>59</sup> Law Commission *Sentencing Guidelines and Parole Reform* (NZLC R94, 2006) at 18.

<sup>60</sup> For instance, the Ministry for the Environment advises that prosecution should only be taken in cases of “significant non-compliance”: Ministry for the Environment, above n 19, at 93. See also, by way of example from a local authority’s enforcement policy, Taranaki Regional Council *Enforcement Provisions and Procedure*



## *B More Stringent Options are Rare*

### *1 Alternative sentences for natural persons are infrequent*

As noted in the introduction to this section, instead of (or in addition to) a fine, natural persons can also be sentenced to a non-monetary penalty, such as community work, community or home detention, or imprisonment.<sup>61</sup> Such penalties are considered more restrictive than a fine, which, together with reparation, is one of the least restrictive sentences available, with only a discharge or order to come up for sentence if called on lower in the hierarchy of sentences.<sup>62</sup> When considering these non-monetary penalties, it is important to note that severity includes not only the length of the term of imprisonment or community detention or home detention, or the number of hours of community work, but the frequency with which these penalties are imposed.<sup>63</sup>

The most serious sentence a natural person can receive for offending against the RMA is a term of imprisonment. Such a sentence is at the apex of the sentencing hierarchy,<sup>64</sup> being reserved for those cases where it meets the relevant purposes of sentencing in s 7 of the Sentencing Act 2002, those purposes cannot be achieved by a sentence other than imprisonment, and no other sentence would be consistent with the application of the relevant principles in s 8.<sup>65</sup> Account must also be taken of the “desirability of keeping offenders in the community so far as that is practicable and consonant with the safety of the community.”<sup>66</sup>

The prosecution studies record that, between 1 October 1991 and 30 September 2012, imprisonment was rarely used. It was not used during the first period (1 October 1991 to 30 June 2001)<sup>67</sup> and was used only twice during the second period (1 July 2001 to 30 April

---

*under Resource Management Act* (2017), where prosecution is referred to (at 5) as being used in “extreme cases”.

<sup>61</sup> The Court could also sentence an offender to supervision or intensive supervision, but these sentences are not generally considered to be imposed for deterrent reasons. For instance, s 46 of the Sentencing Act 2002 provides that “[a] court may impose a sentence of supervision only if the court is satisfied that a sentence of supervision would reduce the likelihood of further offending by the offender through the rehabilitation and reintegration of the offender” and no sentences of supervision or intensive supervision were imposed on offenders in the financial years 2012/2013 to 2016/2017: see Ministry of Justice, above n 41, at Appendix 1.

<sup>62</sup> Sentencing Act 2002, s 10A(2).

<sup>63</sup> Andreas Von Hirsch and others *Criminal deterrence and sentence severity: an analysis of recent research* (Hart Publishing, Oxford, 1999) at 6.

<sup>64</sup> Sentencing Act 2002, s 10A(2)(f).

<sup>65</sup> Section 16(2).

<sup>66</sup> Section 16(1).

<sup>67</sup> Ministry for the Environment *A study into the use of prosecutions under the Resource Management Act 1991: 1 October 1991 - 30 June 2001* (May 2002). One person was, however, given a suspended sentence of six months imprisonment: see *Franklin District Council v McCollum* [1994] NZRMA 407 (DC).

2005),<sup>68</sup> the first time for three months<sup>69</sup> and the second time for 20 weeks.<sup>70</sup> Imprisonment was also used just twice during the third period (1 May 2005 to 30 June 2008),<sup>71</sup> for six weeks<sup>72</sup> and eight weeks,<sup>73</sup> and in both instances the defendant was already serving a term of imprisonment, which essentially ruled out any other sentence. Indeed, the sentencing Judge in the first of these cases noted that the defendant's offending was of a sort that would not normally result in a term of imprisonment,<sup>74</sup> and the same would seem to be true in the second case.<sup>75</sup> Imprisonment was used once during the fourth period (1 July 2008 to 30 September 2012),<sup>76</sup> for a term of six and a half months, the defendant being the same person who was imprisoned in 2004.<sup>77</sup>

It would appear that no further terms of imprisonment had been imposed by the end of the 2016/2017 financial year.<sup>78</sup> As such, putting the two defendants that were already incarcerated when sentenced on RMA offending to one side, in the 26 years of the RMA to the end of the 2016/2017 financial year only two defendants had been sentenced to imprisonment (one of these twice), for terms ranging from 10 weeks to six and a half months.

---

<sup>68</sup> Ministry for the Environment *A study into the use of prosecutions under the Resource Management Act 1991: 1 July 2001 - 30 April 2005* (February 2006).

<sup>69</sup> *R v Conway* [2005] DCR 243.

<sup>70</sup> *R v Borrett* (2003) 10 ELRNZ 46 (DC). This was reduced on appeal to 12 weeks: *R v Borrett* (2003) 10 ELRNZ 133 (CA).

<sup>71</sup> Ministry for the Environment *A study into the use of prosecutions under the Resource Management Act 1991: 1 May 2005 - 30 June 2008* (March 2009).

<sup>72</sup> *R v Feeney* DC Hamilton CRI 2006-019-6265, 7 April 2008.

<sup>73</sup> *Thames-Coromandel District Council v May* DC Auckland CRI-2008-004-7940, 5 June 2008.

<sup>74</sup> *R v Feeney*, above n 72, at 12.

<sup>75</sup> *Thames-Coromandel District Council v May*, above n 73. Although the point is not explicitly discussed, the nature of the offending (a breach of s 9 due to an excessive number of buildings on the property), the lack of profits, the presence of remorse and a guilty plea would suggest that imprisonment would not otherwise have been imposed, notwithstanding that the offending was deliberate.

<sup>76</sup> The prosecution study refers to imprisonment having been used twice during this period (Ministry for the Environment, above n 40), but the defendant in *Taranaki Regional Council v Moulard* DC New Plymouth CRI-2011-043-3823, 29 January 2013 was in fact sentenced to community detention (and community work). It can be noted that in a further case the Judge wanted to impose a term of imprisonment (the defendants being sentenced to seven months' imprisonment on other charges), but was prohibited from doing so by s 339A of the RMA: see *Maritime New Zealand v Balomaga* DC Tauranga CRI-2011-070-7734, 25 May 2012 at [35].

<sup>77</sup> *R v Conway (No 2)* DC Auckland CRI-2008-004-19495, 18 December 2009 (appeal dismissed: *Conway v R* [2013] NZCA 438, [2013] NZRMA 461; leave to appeal declined: *Conway v R* [2013] NZSC 103, [2013] NZRMA 479).

<sup>78</sup> The Ministry of Justice has no record of any sentences of imprisonment imposed for the years 2012/2013 to 2016/2017: see Ministry of Justice, above n 41, at Appendix 1. It can be noted that, in January 2018, an individual was imprisoned for two and a half months for damaging native trees (see *R v Lau*, above n 34). An appeal against sentence was dismissed, the Court noting that this case involved "deliberate, significant and financially motivated breaches of rules designed to protect the natural environment" (see *Lau v R*, above n 34, at [24]), and that a longer term would even have been justifiable (at [26]). Mr Lau was subsequently sentenced to an additional two years' imprisonment on a range of RMA, Building Act 2004 and Companies Act 1993 charges (see *R v Lau*, above n 34) and had an appeal against that sentence also dismissed (a Solicitor-General's appeal against sentence was also dismissed) (see *R v Lau*, above n 34).

Such terms are between just under 10% and just over 25% of the maximum penalty of two years.

Despite s 339(1) referring only to imprisonment as an alternative to a fine for natural persons, s 339(4) of the RMA and the provisions of the Sentencing Act 2002 allow the Court to impose a sentence of community work, a different community-based sentence or home detention.<sup>79</sup> As with fines and imprisonment, there is guidance provided in the Sentencing Act 2002 as to when it is appropriate to use these sentences.<sup>80</sup> These sentences fall between imprisonment and fines in terms of restrictiveness, with home detention being a more restrictive sentence than intensive supervision and community detention, which in turn are more restrictive sentences than community work and supervision.<sup>81</sup>

In the period covered by the first prosecution study (when the Criminal Justice Act 1985 was the primary sentencing statute), there were eight sentences of community service and three sentences of periodic detention imposed.<sup>82</sup> In the second study period (by which time the Sentencing Act 2002 had come into force) there were four sentences of community work imposed,<sup>83</sup> and the third study records that there were 12 sentences of community work handed down.<sup>84</sup> Finally, during the fourth period there were 22 sentences of community work imposed (one of which was substituted for a fine after a failure to complete the work), two of which also included sentences of community detention.<sup>85</sup>

---

<sup>79</sup> See ss 45(1)(a), 54B(1)(a), 69B(1)(a) and 80A(1)(a) of the Sentencing Act 2002. A “community-based sentence” is defined in s 44(1) of the Sentencing Act 2002 as a sentence of community work, supervision, intensive supervision and community detention. Given s 55(1)(a) allows a court to sentence an offender to community work if he or she is convicted of an offence punishable by imprisonment, it is not clear why s 339(4) of the RMA was maintained when the Sentencing Act 2002 was enacted.

<sup>80</sup> For example, s 56(1) provides that:

In considering whether to impose a sentence of community work, the court must give particular consideration to—  
 (a) whether the nature and circumstances of the offending make it appropriate for the offender to be held accountable to the community by making compensation to it in the form of work, in addition to, or instead of, making reparation to any person in respect of the offending; and  
 (b) whether the sentence is appropriate having regard to the offender’s character and personal history, and to any other relevant circumstances.

<sup>81</sup> Section 10A(2).

<sup>82</sup> Ministry for the Environment, above n 67, at 7. Periodic detention has been described as a “halfway house between full imprisonment on the one hand and some of the more liberal community-based sentences on the other” (see *Wijlens v Police* HC Auckland AP115/94, 20 June 1994 at 3), and it was “elided” with community service into a single sentence of community work in the Sentencing Act 2002: see *R v Conway*, above n 11, at [45].

<sup>83</sup> Ministry for the Environment, above n 68, at 10.

<sup>84</sup> Ministry for the Environment, above n 71, at 16.

<sup>85</sup> Ministry for the Environment, above n 40, at 19. While the study records that there were 21 sentences of community work, a review of the appendices reveals an additional sentence of community work / community detention recorded as imprisonment (*Taranaki Regional Council v Mouland*, above n 76).

Turning to the most recent data from the Ministry of Justice, which records the most serious sentence a defendant received, 391 offenders (which includes both natural and non-natural persons) were sentenced between 2012/2013 and 2015/2016, with two receiving home detention, six receiving community detention and 11 community work.<sup>86</sup> In some of these cases, the defendants will have also received a fine,<sup>87</sup> but for the most part a community-based sentence is only imposed because the offender does not have sufficient funds to pay a monetary penalty.<sup>88</sup> In these instances, the Court has noted that it is not possible to directly compare the number of hours of community work imposed with the fines that would otherwise have been imposed,<sup>89</sup> and the same reasoning would apply to months of community detention or home detention. The average number of hours of community work imposed per offender during this period was 152 and the average days of home detention and community detention were 51 and 100 (respectively).<sup>90</sup> No offenders were sentenced to community-based sentences or home detention in 2016/2017.<sup>91</sup>

## *2 Additional sentences are compliance-focussed, not punitive*

For both natural and non-natural persons, there are two additional/alternative penalties that can be imposed following a successful prosecution.<sup>92</sup> One is an enforcement order requiring a defendant to do, or not do, one of the things set out in s 314 of the RMA. The other is an order requiring a consent authority to serve notice, under s 128(2) of the Act, of the review of a resource consent held by the person, but only if the offence involves an act or omission that contravenes the consent.

Looking first at enforcement orders, as noted in Chapter 2 there are a number of different things these can be used for, such as requiring a person to cease doing, or prohibiting them from commencing, something that is contravening (or is likely to contravene) the Act, a rule or a resource consent.<sup>93</sup> Alternatively, the enforcement order could require a person to do

---

<sup>86</sup> Ministry of Justice, above n 41, at Appendix 1.

<sup>87</sup> For instance, in *Tauranga City Council v Kent* DC Tauranga CRI-2012-070-4916 & 4899, 18 March 2013 and *R v McCullough* [2016] NZDC 4000 the offenders were sentenced to community work and a fine.

<sup>88</sup> See, for example, *Southland Regional Council v Egginton* [2015] NZDC 14393.

<sup>89</sup> *Wellington Regional Council v Phillips* [2016] NZDC 2817 at [6]. For instance, in one case what would have been a fine “in the vicinity of \$23,000 to \$25,000” became a fine of \$3,000 and 200 hours community work (*R v McCullough*, above n 87, at [19]), yet in another case fines amounting to \$114,750 (albeit not adjusted for totality) became a sentence of 100 hours community work (*Southland Regional Council v Egginton*, above n 88).

<sup>90</sup> Ministry of Justice, above n 41, at Appendix 1.

<sup>91</sup> At Appendix 1.

<sup>92</sup> RMA, s 339(5).

<sup>93</sup> Section 314(1)(a).

something to ensure he or she complies with the Act, a rule or a resource consent.<sup>94</sup> Further options include that the person could be required to remedy or mitigate any adverse effect on the environment they have caused,<sup>95</sup> or pay the actual and reasonable costs and expenses of remedying or mitigating any adverse effect on the environment caused by that person's breach.<sup>96</sup>

Enforcement orders on sentencing are reasonably uncommon. For instance, in *Bay of Plenty Regional Council v Whitiakau Holdings Ltd*, the sentencing Judge observed that for “virtually all RMA offending, the fact that reparation and enforcement orders are available is a theoretical, but not practical, reality”.<sup>97</sup> This is borne out somewhat by the prosecution studies, which note that there were 36 enforcement orders as part of sentencing in the first period (out of 375 prosecutions), 21 in the second (out of 171 prosecutions), 38 in the third (out of 260 prosecutions) and 32 in the fourth (out of 429 prosecutions).<sup>98</sup> No data has been kept on the number of enforcement orders made on sentencing since then, but it can be observed that eight enforcement orders were imposed in the 39 decisions analysed from the 2016/2017 financial year.

When enforcement orders are made, they typically require the offender either to remedy the damage caused or to fix the issue that led to the non-compliance. In terms of the former, this is understandable on the basis that a sentence of reparation will frequently not be available, as there is often no direct victim.<sup>99</sup> An example is *Queenstown Lakes District Council v Allenby Farms Ltd*, where the Court, in addition to imposing a fine, made an enforcement order requiring the defendant to, among other things, replant various areas that it had unlawfully cleared on its own land.<sup>100</sup> In terms of the latter, it can be observed that the Waikato Regional Council has recently adopted a policy whereby it seeks, as a matter of course, enforcement orders in dairy farm effluent discharge sentencings to “force the farm owner to seek an accredited effluent storage designer to design an effluent storage plan that suited the farm,

---

<sup>94</sup> Section 314(1)(b).

<sup>95</sup> Section 314(1)(c).

<sup>96</sup> Section 314(1)(d). There are further options in paragraphs (da), (e) and (f).

<sup>97</sup> *Bay of Plenty Regional Council v Whitiakau Holdings Ltd* [2018] NZDC 3850 at [236].

<sup>98</sup> Ministry for the Environment, above n 40, at 19. It will be observed that “prosecutions” has been used as the comparator, as opposed to “successful prosecutions” (as this number is not recorded), but given the vast majority of prosecutions are successful the numbers will not be significantly different.

<sup>99</sup> In the sentencing decisions analysed from the 2016/2017 financial year, reparation was ordered on only one occasion: see *Northland Regional Council v Woodbank Trading Ltd* [2016] NZDC 21397. Even in this case it is debatable whether the recipient of the reparation, Northland Regional Council, was a “victim”.

<sup>100</sup> *Queenstown Lakes District Council v Allenby Farms Ltd* [2017] NZDC 3251.

and get it installed.”<sup>101</sup> This is consistent with what Campbell has noted, namely that “[t]he making of enforcement orders as part of the penalty imposed at sentence has become more frequent in recent times, in particular where the offender has not taken steps to remedy the cause of the offending in the time between the offence occurring and sentencing.”<sup>102</sup>

These two types of enforcement orders could be termed “compliance-focussed” and what is largely absent, it is suggested, are “punitive” enforcement orders being imposed on defendants. While these do not obviously seem to fit with the terms of s 314, it is apparent that they are available. For instance, in *Machinery Movers Ltd v Auckland Regional Council* the High Court advised that a sentencing court has, pursuant to s 339(4) and (5) and s 314(1)(b), (c) and (d) and s 314(3) of the RMA, the jurisdiction to impose similar orders as those made in the Canadian case of *R v Bata Industries Ltd*,<sup>103</sup> which included “naming and shaming”.<sup>104</sup> Yet similar orders have been made only occasionally since.<sup>105</sup>

A different sort of punitive enforcement order was issued in *Bay of Plenty Regional Council v Hood*, which required the defendant to cease pig farming, remove all pigs from the property, and after that not keep any pigs on the property (with no end date specified).<sup>106</sup> While it can be observed in this case that the defendant agreed to the making of such an order, as he intended to stop pig farming anyway, as the Judge observed “[i]t is important that the sentence be appropriate in terms of the Sentencing Act 2002 and the Resource Management Act 1991 rather than simply the result of an agreement between the parties”, and that the

---

<sup>101</sup> Gerald Piddock “Council to seek court orders to force non-complying farmers to improve effluent storage” *Stuff* (online ed, Wellington, 14 December 2018). For an example, see *Waikato Regional Council v Pollock Farms (2011) Ltd* [2019] NZDC 2204.

<sup>102</sup> Janette Campbell “Statutory remedies: the enforcement provisions of the Resource Management Act 1991” in Derek Nolan (ed) *Environmental and resource management law* (5th ed, LexisNexis, Wellington, 2015) at [20.50].

<sup>103</sup> *R v Bata Industries Ltd* (1992) 9 OR (3d) 329, 7 CELR (NS) 293 (Ontario Court (Provincial Division)).

<sup>104</sup> *Machinery Movers Ltd v Auckland Regional Council*, above n 1, at 505-506. Bata Industries Ltd was required to:

... have published on the front page of the Bata newsletter for international distribution the facts leading to this conviction of the company and the named directors, Mr Weston and Mr Marchant, the details of the penalties and the terms of probation;

<sup>105</sup> The only examples found on the legal databases are *Auckland Regional Council v Nuplex Industries Limited* DC Auckland CRN2004066321, 18 March 2003 and *Auckland Regional Council v URS New Zealand Limited* DC Auckland CRI-2008-004-13603, 23 July 2010 (sentencing decision); *Auckland Regional Council v URS New Zealand Limited* DC Auckland CRI-2008-004-13603, 6 August 2010 (terms of enforcement order). In terms of the latter, URS New Zealand Limited and the other defendants successfully appealed against their convictions, with the enforcement order accordingly quashed, but no comment was otherwise made about it: see *URS New Zealand Limited v Auckland Regional Council* [2012] NZHC 723.

<sup>106</sup> *Bay of Plenty Regional Council v Hood* [2017] NZDC 25156.

terms (subject to one minor amendment) were “appropriate”.<sup>107</sup> However, no further enforcement orders of this nature appear to have ever been made.

The enforcement order in *Bay of Plenty Regional Council v Hood* was, perhaps, also easier to make in that case because the defendant was not operating pursuant to a resource consent. However, where the offending results from the breach of a consent there is the sentencing option of “an order requiring a consent authority to serve notice, under s 128(2), of the review of a resource consent held by the person”.<sup>108</sup> This can fairly be described as “punitive” because s 128(2), in combination with s 132(4), allows the consent authority, following the review, to cancel the resource consent if “there are significant adverse effects on the environment resulting from the exercise of the consent”. This is, therefore, arguably the most serious penalty a court can impose (along with the punitive enforcement order), and the purpose of it was to provide another deterrent option.<sup>109</sup> However, a search of the relevant legal databases has revealed only one record of a local authority asking for the Court to order such a review (which was declined).<sup>110</sup>

It may be that, rather than reviewing, and potentially cancelling, the resource consent, the conviction will instead be considered by the local authority when it comes time for the consent-holder to renew its (or apply for a new) consent. Accordingly, this is an appropriate time to consider the severity of a RMA conviction in and of itself, but the message from this subsection is two-fold. First, non-monetary sentences for individuals, whether they be imprisonment, home detention, community detention or community work, are infrequent, meaning that their actual length is largely irrelevant (although often towards the lower end).<sup>111</sup> Second, where an enforcement order is made, it is likely to be compliance-focussed, rather than punitive, and a resource consent review, which can also be punitive, does not appear to have ever been ordered. As such, these penalties are contributing little to the overall severity of the RMA’s offences.

---

<sup>107</sup> At [27].

<sup>108</sup> RMA, s 339(5)(b).

<sup>109</sup> Cabinet Paper, above n 54, at 25.

<sup>110</sup> *Taranaki Regional Council v A J Cowley Ltd* DC New Plymouth CRI-2011-043-2428 & 3192, 15 December 2011. The Council’s application was declined on the basis that there was (at [29]) no “obvious connection between the offending or circumstances surrounding it and the conditions of consent” and “the consent was due to expire in 2014 in any event”.

<sup>111</sup> Indeed, if the 2016/2017 data is anything to go by, they are being imposed even less frequently than they once were.

## *C “Secondary” Penalties Provide Little Bolstering*

### *1 The formal consequences of a conviction are low*

The conviction is the last formal penalty, although in some ways it could have been discussed first, as the initial decision a sentencing court must make is whether or not to convict the defendant.<sup>112</sup> However, it is appropriate to deal with it last as it is the formal penalty that appears to carry, in the usual course, the least punitive effect.<sup>113</sup> This may seem at odds with the fact that defendants often apply for a discharge without conviction (which suggests that at least these offenders believe a RMA conviction to be a significant penalty and one they wish to avoid), but this can be explained in another way. A discharge without conviction means that there will not be any fine or non-monetary sentence imposed (although costs and/or reparation can be ordered),<sup>114</sup> and so it may be that some defendants apply for a discharge without conviction to avoid receiving a “primary” penalty. Indeed, even if the defendant is unsuccessful, there may be a tactical benefit in making such an application as it implies that the offending is low level (on the basis that a discharge without conviction can only be granted if “the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence”) and could have the effect of orientating the sentencing submissions accordingly.<sup>115</sup>

In one sense, it is understandable that defendants are most concerned about the “primary” penalty they face (typically, as noted above, the fine), as the effects of it will be immediate compared with those of a conviction. But a conviction is generally considered to be a penalty, quite apart from any other sentence imposed, because it labels the defendant, to the public, as a “criminal”, and for many offences this has real and serious effects.<sup>116</sup> For instance, a conviction can have formal consequences, including travel and employment/contracting implications, it might affect the defendant’s ability to obtain insurance (and the premiums that must be paid), and it can restrict one’s ability to be a

---

<sup>112</sup> Section 11(1) of the Sentencing Act 2002 provides that before convicting and imposing a sentence on an offender who has been found, or has pleaded, guilty, the Court must consider whether to discharge the offender without conviction, convict and discharge the offender without further penalty, or convict the offender and order he or she to come up for sentence if called upon.

<sup>113</sup> It can be observed, however, that in a minority of cases a conviction is of great importance: see, for example, the situation described in Jennifer Eder “Marlborough winery contaminates neighbours’ drinking water with grape waste” *Stuff* (online ed, Wellington, 16 December 2018), where the defendant’s lawyer submitted that “[i]f convicted, the company could lose several million dollars in export deals each year, likely forcing the company to downsize”.

<sup>114</sup> Sentencing Act 2002, s 106(3).

<sup>115</sup> Section 107.

<sup>116</sup> AP Simester and others *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (Hart Publishing, Oxford, 2013) at 5.



member of professional organisations. Further, a conviction may have informal consequences, such as arousing in the offender a sense of shame or embarrassment, and it can result in adverse treatment by members of the offender's community (stigma).<sup>117</sup>

However, it is suggested that these consequences appear to be of less importance in RMA offending. While the effect of a conviction ultimately depends on the type and severity of the offence committed, and the constitution and intentions of the offender, some general comments about the formal and informal consequences of a RMA conviction can be made.

Starting with the formal consequences, these do not typically appear to be significant. For instance, there is uncertainty as to whether a RMA conviction will impact on a defendant's ability to travel,<sup>118</sup> and other restrictions will likely need to be assessed on a case-by-case basis.<sup>119</sup> But where one would expect a RMA conviction to have the greatest impact – that is, on future resource consent applications – it is not formally recognised. In the previous subsection it was noted that a conviction appears to never lead to a consent review, despite there being statutory provision for this,<sup>120</sup> and nor are RMA convictions explicitly a relevant factor for a consent authority to take into account in considering an application for a resource consent.<sup>121</sup> A conviction (and non-compliance generally) may be taken into account as “any other matter the consent authority considers relevant and necessary to determine the application”,<sup>122</sup> but this will depend on the consent authority's disclosure requirements and knowledge of the applicant, and the emphasis the consenting arm of the council places on previous history (as opposed to the economic benefits that the application will bring).<sup>123</sup>

In terms of informal consequences, it is no doubt the case that some people convicted of RMA offending will feel ashamed or embarrassed, and that some businesses will find their reputation adversely affected. However, it is questionable whether the shame, embarrassment

---

<sup>117</sup> For a discussion of the difference between shame and stigma, see Von Hirsch and others, above n 63, at 40.

<sup>118</sup> *Tauranga City Council v Jacko Basil Holdings Ltd*, above n 13, at [29]-[30].

<sup>119</sup> For instance, the courts have recognised that such convictions will be captured under an employer's usual request for disclosure of previous convictions, and might be relevant in the dairy industry: see *Otago Regional Council v Liquid Calcium Ltd* [2017] NZDC 11458 at [27]. Similarly, they may impact on tender applications by a company, but evidence is specific evidence is required to substantiate this: see *Waikato Regional Council v Fulton Hogan Ltd* [2018] NZDC 2711 at [147]-[148].

<sup>120</sup> RMA, s 339(5)(b).

<sup>121</sup> RMA, s 104(1).

<sup>122</sup> Section 104(1)(c).

<sup>123</sup> Brown's survey of local authorities found that 59% of councils did take into account the compliance history of a resource consent applicant, while 41% did not, although in some instances the former appears to relate to setting the conditions of, not whether to grant or decline, the consent: see Marie Brown *Last Line of Defence: Compliance, monitoring and enforcement of New Zealand's environmental law* (Environmental Defence Society, Auckland, 2017) at 51.

or reputational damage is because the person/business has received a conviction, as opposed to the mere fact they have had enforcement action taken against them (and been penalised). For instance, such consequences would typically arise following media coverage of a prosecution, but the focus of reporting is often on the nature of the offending and the penalty imposed, rather than the fact the offender received a conviction. Indeed, given the regulatory nature of the RMA, coupled with the fact that the usual penalty imposed is a monetary impost, the public may not even be aware that these are even criminal offences. It is, accordingly, convenient to discuss shame, embarrassment and reputation damage more broadly in the context of “informal penalties”.

## *2 Informal penalties are variable*

It must be remembered that, as noted in Chapter 3, informal penalties – that is, those “costs” that are incurred as a result of enforcement action but not officially imposed – can be far greater than the formal penalty imposed.<sup>124</sup> These range from direct, quantifiable, costs, such as the legal expenditure incurred in defending charges, to indirect, and often unquantifiable, costs. The latter includes those costs associated with the inconvenience of dealing with local authority investigators and resolving proceedings (“hassle” costs), or the decline in reputation to a business that results from simply facing enforcement action (potentially magnified where this results in a conviction).<sup>125</sup> As would be expected, such costs will be case specific and obviously not recorded, but, as with convictions, some general comments can be made.

First, the direct costs involved in defending RMA charges can be considerable,<sup>126</sup> although one would expect these would typically be less than those incurred by the prosecutor, given the local authority must be the one to drive the case (for instance, gather sufficient evidence, disclose the relevant material to the defendant, prove the charges beyond reasonable doubt, and so on). These costs will not, however, necessarily be proportionate to the seriousness of the charge – a major contaminant discharge may only need the entry of a guilty plea and a relatively simple plea in mitigation, whereas a technical District Plan breach may need a lengthy defended hearing with expert evidence (and then a plea in mitigation if found guilty).

<sup>124</sup> Robert Baldwin “The New Punitive Regulation” (2004) 67(3) *Modern Law Review* 351 at 371.

<sup>125</sup> Anthony Ogus and Carolyn Abbot “Sanctions for Pollution: Do we have the right regime?” (2002) 14(3) *Journal of Environmental Law* 283 at 290.

<sup>126</sup> For example, in *Wallace Corporation Ltd v Waikato Regional Council* [2012] NZHC 1420 it was noted that the defendants incurred legal costs of \$426,757 and expert costs of \$146,240 in unsuccessfully defending a (albeit difficult and complex) prosecution, and a further \$140,897 in legal costs in successfully appealing against the first instance decision. They received a costs award of \$416,522.

Rather, the costs incurred will more likely be a function of the importance of the case to the defendant and resources available to it.

Similarly, how much of an effect “hassle” costs have will typically be related to the constitution of the defendant. Large firms will be accustomed to dealing with regulators and the court process, and may have experts in their staff for this purpose (who often will have a local government background), meaning the business of the firm can go on relatively uninterrupted.<sup>127</sup> On the other hand, individuals and small-to-medium sized enterprises may find such interactions to be unfamiliar and uncomfortable, and may need to assign such responsibilities to frontline staff, diverting them away from their primary tasks.

The converse is true for reputational damage. One would expect that individuals and small-to-medium sized businesses are more likely to be concerned about the primary penalty that may be imposed, while large firms – especially those that consider themselves good corporate citizens – may find any reputational damage that results from enforcement action to be the biggest penalty.<sup>128</sup> It is, of course, more complex than this, as some small family businesses with a long history in a particular community will place great weight on their reputation,<sup>129</sup> and some large corporations will consider that all the public really cares about is the price and quality of the product they manufacture, not how they do so.<sup>130</sup> Whatever the case, though, for reputational damage to be brought about the public, or at least the regulated community, needs to be made aware of any enforcement action.<sup>131</sup>

Yet publicity is sporadic. The starting point is that there is no centralised reporting of RMA prosecution outcomes, with the Ministry for the Environment only publishing, by way of the National Monitoring System (and before that the Local Authority Surveys), data on the number of prosecutions brought, not the results of these cases. Nor do the courts publish any analysis of the outcomes achieved, with the most recent Environment Judges’ Annual Review

---

<sup>127</sup> It has even been suggested that “large enterprises...have been able to resist local authority investigations due to their ability to impress local level managers and apply significant legal resources to make case resolution more complex, confusing, time-consuming and expensive: see Warren Adler *The state of the compliance and enforcement regime under the Resource Management Act 1991* (Strategik Group, 2008) at 11. This would be one explanation for why large corporate entities are rarely prosecuted – for instance, no large businesses were the defendants in any of the sentencing decisions analysed from the 2016/2017 financial year. However, an alternative explanation is that large entities are only prosecuted rarely because they offend less, which they can do because of their resources and commitment to protecting their reputation.

<sup>128</sup> *Bay of Plenty Regional Council v Whitiakau Holdings Ltd*, above n 97, at [230].

<sup>129</sup> David Whyte “An intoxicated politics of regulation” in Hannah Quirk, Toby Seddon, and Graham Smith (eds) *Regulation and Criminal Justice* (Cambridge University Press, United Kingdom, 2010) at 186.

<sup>130</sup> Baldwin, above n 124, at 364.

<sup>131</sup> Jon Silberman “Does Environmental Deterrence Work? Evidence and Experience says Yes, But We Need to Understand How and Why” (2000) 30(7) *The Environmental Law Reporter* 10523 at 10528-10529.

devoting only two paragraphs in the 32 page report to prosecutions,<sup>132</sup> and the Registrar of the Environment Court's Annual Report mentioning these in only one sentence in a 12 page report.<sup>133</sup> This is presumably because the prosecutions are heard in the District Court, but RMA cases are given no specific attention in the reports issued by that Court either.<sup>134</sup>

The task is therefore left up to the local authorities to provide details of the outcomes of the cases they have brought, but only a small minority of councils publish regular enforcement reports detailing their successful prosecutions.<sup>135</sup> Given it is unusual to find members of the public in attendance at a RMA sentencing hearing,<sup>136</sup> the community is, accordingly, left to rely on press releases and media reports for individual cases. While these appear to be issued more frequently than in the past,<sup>137</sup> they are not comprehensive and, as with the nature of the news cycle, will become "lost" if they are not seen in the short period after they are published.

Finally, if a member of the public wanted to read a sentencing decision after seeing a summary in an enforcement report, press release or media report, there is no guarantee they would be able to do so. Local authorities often do not publish sentencing decisions on their websites and only a limited number of RMA sentencing decisions are available on public websites.<sup>138</sup> Further, these cases are listed with all other District Court sentencing decisions, meaning that the searcher needs some level of knowledge to be able to find them.

The picture painted here is one of variability. Some defendants will spend a lot of money defending the charges and feel deeply embarrassed for having offended. For other defendants, they will not care that they have been prosecuted and they will not suffer any

---

<sup>132</sup> Environment Court of New Zealand *Annual Review Calendar Year 2017* at 10.

<sup>133</sup> *Report of the Registrar of the Environment Court for the 12 months ended 30 June 2017* at 6.

<sup>134</sup> See, for example, District Court of New Zealand *Annual Report* (2017).

<sup>135</sup> See, for example, Bay of Plenty Regional Council *2016/2017 Regulatory Compliance Report* (2017); Environment Southland *Environmental Compliance Monitoring Report 2016/17* (2017). Others publish an enforcement report but focus on annual statistics rather than individual offenders.

<sup>136</sup> Interestingly, as Walters and Westerhuis note, from their 7 days in the New South Wales Land and Environment Court:

As proceedings are open to the public but rarely attract individual not involved in a case, our presence often provoke[d] interest, notably from the accused and their defence counsel. Such interests resulted in several discussions with convicted offenders who were business proprietors and environmental consultant[s], eager to ensure that their remorse and efforts to compensate were duly noted, and that they ha[d] gone to great lengths to comply and co-operate with government regulators and enforcement bodies.

See Reece Walters and Diane Westerhuis "Green crime and the role of environmental courts" (2013) 59(3) *Crime, Law and Social Change* 279 at 282.

<sup>137</sup> For instance, a review of the Waikato Regional Council's media releases shows that it regularly reports on successful prosecutions: see Waikato Regional Council "Media releases - recent" <[www.wrc.govt.nz](http://www.wrc.govt.nz)>.

<sup>138</sup> Such as The District Court of New Zealand <[www.districtcourts.govt.nz](http://www.districtcourts.govt.nz)> and New Zealand Legal Information Institute <[www.nzlii.org](http://www.nzlii.org)>.

noticeable impact on their business. To an extent, this variability is to be expected. However, it is suggested that matters are not helped by the inconsistency between local authorities in terms of how successful prosecutions are promoted, and the lack of a centralised system for reporting on outcomes.

Overall, the variability of the informal penalties, together with the apparently low formal consequences of a conviction, means that the severity of the RMA's offences is mostly determined by the "primary" penalty imposed. Sometimes the "primary" penalty will come from towards the upper end of the hierarchy of sentences, or very occasionally a punitive enforcement order, but it is much more common that it will be a fine. Yet while there have been gradual increases to average fines levels, these could still only be described as modest. Accordingly, the severity of the RMA's offences appears to be no more than moderate.

#### *IV Low Certainty of Imposition*

The second aspect in determining the expected cost of the offences is the certainty that a penalty will be imposed. As set out in Chapter 3, there are (at least) three factors that make up the certainty of having a criminal sanction imposed – the probability that a breach is detected, the probability that it results in enforcement action, and the probability that this enforcement action results in a criminal penalty being imposed. These aspects of certainty are considered in this section (the second and third factors being discussed together). First, it is argued that, despite there being a number of ways to detect breaches of the RMA, it is likely that many breaches are being missed. It is then argued that, when a breach is detected, formal enforcement action often does not follow, and if it does follow then such action is rarely prosecution (although the local authority is usually successful when it does bring a case).

##### *A Many Breaches are Missed*

Local authorities generally rely on a combination of methods to detect non-compliance with the RMA, some of which are "reactive" and others which are "proactive".<sup>139</sup> In terms of the former, people can make complaints about suspected breaches to the relevant local authority, with many councils operating "hotlines" 24 hours a day, 7 days a week to receive these. In terms of the latter, local authorities monitor the resource consents they have issued, to ensure that consent-holders are complying with the conditions of the consent, and undertake general

---

<sup>139</sup> See generally Ministry for the Environment, above n 19, at Part 5.

monitoring of plan rules. Each of these different ways of detecting non-compliance needs to be considered, as they together make up the probability that a RMA breach will be detected.

Looking first at complaints, these will typically come from a member of the public, given there is often no direct victim of RMA offending. The complaint could relate to (suspected) breaches of consent conditions or plan rules, but they are typically more general than this, for instance where someone notices that a waterway is discoloured. Councils are expected to investigate such complaints and are under a duty to keep available at their offices not only a summary of all written complaints received during the preceding five years, but also information on how they dealt with each complaint.<sup>140</sup> The Ministry for the Environment has endeavoured, at least in the National Monitoring System, to get local authorities to separate complaints out from monitoring when reporting – that is, if a complaint triggers monitoring, then it should be recorded as a complaint, not monitoring – and therefore there are reasonable records relating to the numbers of complaints received.<sup>141</sup> In recent times, these have ranged from 24,269 per year (in 2010/2011)<sup>142</sup> to 31,446 per year (in 2015/2016),<sup>143</sup> with there being 27,857 complaints in 2016/2017, the last year of data available at the time of writing.<sup>144</sup>

This is a large number of complaints, and it gives the impression that local authorities are detecting a lot of RMA non-compliance through this means. However, a complaint is not the same as a detected breach, and not all of these complaints are followed up in detail, or even at all. As the Ministry for the Environment has noted:<sup>145</sup>

The majority of councils have adopted a risk-based approach to complaints response ... and respond to complaints depending on their risk and priority. Most councils stated that they respond to most complaints within two to three days. Some councils reported, however, that due to a lack of resources and staff capacity, there is a backlog of complaints that had not been investigated.

---

<sup>140</sup> RMA, s 35(5)(i).

<sup>141</sup> Ministry for the Environment *National Monitoring System - information requirements: Guidance for the 2016/17 financial year* (2016) at 46.

<sup>142</sup> Ministry for the Environment *Resource Management Act: Survey of Local Authorities 2010/2011* (2011) at 56.

<sup>143</sup> Ministry for the Environment *National Monitoring System for 2015/16* (2017).

<sup>144</sup> Ministry for the Environment, above n 29.

<sup>145</sup> Ministry for the Environment *Compliance, monitoring and enforcement by local authorities under the Resource Management Act 1991* (2016) at 20. The report goes on to note, as one example, that (at 20-21):

One regional council asks complainants to assist with its CME activities by sending in photographs of the alleged breach, if it is appropriate and safe to do so. Given the large area of the region and limited capacity of council staff, this council is largely reliant on the cooperation of the community to support its CME activities. Using the photos provided, the council carries out a 'desktop assessment' to determine whether an investigation is required. In cases where the council is satisfied that a breach has occurred, in most cases the council contacts the alleged offender and asks them to remedy the breach without carrying out a site visit. Where the alleged breach is significant, the council will carry out a site visit.

This means that there will be breaches of the RMA that, despite being notified to the local authority (in the form of a complaint), are not “detected”. Indeed, even if the breach is established, if the party responsible for it cannot be located then it will still not reach the threshold for detection.

Part of the reason why not all complaints can be followed up is that local authorities spend a lot of their time monitoring resource consents. The Ministry for the Environment has reported on the monitoring of resource consents from the start of the local authority surveys, but the details of what was reported changed so frequently that the numbers only became meaningful since the introduction of the National Monitoring System.<sup>146</sup> Focussing then on this data, the latest figures available at the time of writing record that, during the year ended 30 June 2017, there were 99,986 resource consents nationwide that required monitoring.<sup>147</sup>

Of these 99,986 resource consents that required monitoring during that year, 77,013 were in fact monitored. It can immediately be seen, therefore, that a little over a fifth of consents (approximately 22,000) that should have been monitored were not.<sup>148</sup> However, it is likely that the number is greater than this, as it is apparent that some councils monitored individual resource consents more than once, yet this is only reflected in the monitored (as opposed to the required monitoring) column of the National Monitoring System data. For instance, in 2016/2017 Wellington City Council had 343 resource consents that required monitoring, yet 490 resource consents were in fact monitored.<sup>149</sup>

From the 77,103 resource consents that were monitored in 2016/2017, 13,289 were found to be in non-compliance.<sup>150</sup> This would appear to suggest that resource consent monitoring detects a considerable number of RMA breaches. However, the first point to note is that a binary system of compliance or non-compliance does not give any indication as to the level

---

<sup>146</sup> For instance, between 1997 and 2000 local authorities were only required to report on the number of breaches of resource consent conditions. From 2001 to 2008 they reported on the number of resource consents that required monitoring, how many were monitored, and, of those that were monitored, how many complied with their consent conditions. But from 2010 to 2013, the focus shifted to the number of *new* resource consents requiring monitoring (and how many were monitored and, of those that were monitored, how many complied with their consent conditions).

<sup>147</sup> Ministry for the Environment, above n 29. A similar number – 99,400 – were required to be monitored the previous year: Ministry for the Environment, above n 143.

<sup>148</sup> For a recent example of what can happen when a local authority does not monitor a resource consent, a failure which was described by the sentencing Judge as “reprehensible and irresponsible, to say the least”, see *Gisborne City Council v Juken New Zealand Ltd* [2019] NZDC 24075 at [26].

<sup>149</sup> Ministry for the Environment, above n 29. Wellington City Council reported 441 instances of resource consent non-compliance.

<sup>150</sup> “Non-compliance” is defined as being “in non-compliance with at least one condition”: Ministry for the Environment, above n 141, at 46.

of non-compliance. Self-evidently, significant non-compliance is worse than moderate non-compliance, which is worse than low risk non-compliance, and it is not clear how many of these 13,289 breaches fell into which category.<sup>151</sup> More importantly for present purposes, though, a distinction needs to be made between (what could be termed) “technical” breaches of the RMA and “substantive” breaches of the RMA. The former are those where, because a consent-holder is not complying with the conditions of its consent, it is “technically” no longer allowed to undertake the underlying activity and so is in breach of the RMA in that way.<sup>152</sup> Substantive breaches are those where there has been a direct contravention of the RMA, such as discharging a contaminant into water when this was not expressly allowed, contrary to s 15(1)(a).

Resource consent monitoring is important as it will help to identify technical breaches, which may well mean that there is a systemic issue that could lead to a substantive breach. However, it will not generally identify substantive breaches unless these happen to occur on the day that the inspection takes place.<sup>153</sup> If such a breach occurs on any other day of the year when monitoring is not taking place, it will go undetected by the local authority unless the council is alerted to it by the public (that is, by making a complaint) or the consent-holder. However, there is no guarantee that a substantive breach will be observed by a member of the public, that it will be identified as a breach if seen, and that it will be reported to a local authority if identified. Further, while some consents require the holders to report any breaches, this is not universal and whether reporting in fact happens depends on the attitude of the consent-holder. On the one hand, he or she may decide to report the breach and hope the local authority will “reward” them for doing so by treating the matter informally (or less formally than it might otherwise). Equally, however, the consent-holder might decide to not report it, on the basis that the local authority is unlikely to detect it, thereby running the risk

---

<sup>151</sup> Data on whether the non-compliance was low risk, moderate or significant will be collected from the 2018/2019 financial year: Ministry for the Environment *National Monitoring System - information requirements: Guidance for the 2018/19 financial year* (2018) at 12-13.

<sup>152</sup> The Guidelines issued by the Ministry for the Environment, above n 19, state that (at 72) the breach of a resource consent condition is not an offence against the Act, “unless there has been a breach of one or more of the other categories below [such as a regional or district rule], which are offences against the RMA). However, the activity to which the breach relates is no longer expressly authorised by the council.” For a discussion on two conflicting decisions on whether breaching a resource consent condition is, in and of itself, an offence, see Kimberly McMurray-Cathcart “Breaching Resource Consent Conditions” (2000) 9 Auckland University Law Review 280. For a recent case where a breach of a resource consent was an offence, see *Gu v Auckland Council* [2017] NZDC 29242.

<sup>153</sup> Which is even less likely for those regions where councils warn consent holders, either generally (that is, they could be inspected any time in the next X days or months) or specifically (that is, they will be inspected on a certain day), of an impending inspection. However, sometimes even when a regulatee has been told the date and time of an inspection a substantive breach will still be detected: for an example of this, see *Waikato Regional Council v Rymanda Farms Ltd*, above n 12, at [18]-[22].



that, if it is identified, it will be dealt with more harshly by the local authority (and, if successfully prosecuted, the courts).

The final way of detecting non-compliance is general monitoring of plan rules, but this is typically given a lower priority than complaints and resource consent inspections. Such monitoring involves local authorities checking whether people are undertaking a permitted activity (and, if so, whether they are complying with any required conditions), an activity for which they need a resource consent (but do not have one) or a prohibited activity. This is one of the most difficult tasks for an enforcement officer, as there are often no notification requirements for those undertaking a permitted activity and, self-evidently, those undertaking activities that need a resource consent or activities that are prohibited will not notify the council.<sup>154</sup> Further, the size of many regions makes such general monitoring impractical and, even if such monitoring is undertaken, it can be difficult to determine if a breach has occurred, because permitted activity rules must be written broadly given their general application.<sup>155</sup>

The National Monitoring System data shows that, in 2016/2017, there were only 2,993 instances of general plan rule monitoring undertaken nationwide, and this was by just 14 local authorities (with three of these councils doing so on five or fewer occasions).<sup>156</sup> Indeed, one local authority, Hamilton City Council, was responsible for over half the total instances of general plan rule monitoring (with 1,722). While there seem to be gaps in the data – for instance, no instances of general plan rule monitoring are recorded against the local authority that had the most such instances in 2015/2016, Waikato Regional Council<sup>157</sup> – it is unlikely that there is any significant amount of general plan rule monitoring undertaken.

Overall, therefore, it would appear that many RMA breaches are not being detected. Complaints are more likely to identify substantive breaches, but local authorities are being

---

<sup>154</sup> Bay of Plenty Regional Council, above n 135, at 54. Some local authorities ask to be notified when a person is undertaking a permitted activity (see, for instance, Waikato Regional Council “Permitted activities” <[www.waikatoregion.govt.nz/](http://www.waikatoregion.govt.nz/)>).

<sup>155</sup> This has been a criticism of the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017: see Madeleine Wright, Sally Gepp and David Hall *A Review of the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017* (Environmental Defence Society Inc and Royal New Zealand Forest & Bird Protection Society of New Zealand, 2019) at 2.

<sup>156</sup> Ministry for the Environment, above n 29. In 2015/2016 there were 3,173 instances of general plan rule monitoring undertaken nationwide, but this was by only 19 local authorities, and six of these did so on five or fewer occasions: see Ministry for the Environment, above n 143. In 2014/2015, there were 4,176 instances of general rule monitoring undertaken by 17 local authorities, with three of these doing so on five or fewer occasions: see Ministry for the Environment *National Monitoring System for 2014/15* (2016).

<sup>157</sup> Ministry for the Environment, above n 143.

overwhelmed by the number they need to respond to. Resource consent inspections do a reasonable job of identifying technical breaches, but will only detect substantive breaches if these happen – coincidentally – on the day of the inspection. Then there is likely to be a great mass of technical and substantive breaches that go unnoticed, as there is little time, and it is somewhat impractical, for local authorities to undertake any significant level of general plan monitoring.

### *B Detected Breaches are Rarely Prosecuted*

Despite many breaches being missed, it is obviously the case that some RMA breaches are detected, and upon detection a local authority has several options. The first decision a local authority has to make is whether to take formal enforcement action or act informally (take no action at all or give the offender a warning, either orally or in writing).<sup>158</sup> If the local authority decides to take formal enforcement action, it must choose to go down the directive or punitive route, or both. As noted in Chapter 2, the directive route contains the options of the lower-level abatement notice (issued by an enforcement officer) and the higher-level application for an enforcement order (made to the Environment Court). The punitive route contains the options of the lower-level infringement notice (issued by an enforcement officer) and the higher-level prosecution (heard in the District Court by, usually, an Environment Judge). This subsection looks first at the probability that a (detected) breach will result in formal enforcement action and then at the probability that this action will be a (successful) prosecution.

#### *1 Much informal enforcement action*

It is, however, very difficult to gauge the probability that a detected RMA breach will result in formal enforcement action, as there is limited data on the number of detected RMA breaches. While the number of complaints is known, there is no record, in either the local authority surveys or the National Monitoring System, as to what percentage of these were found to be RMA breaches.<sup>159</sup> Similarly, there is no record of how many of the instances of

---

<sup>158</sup> In this thesis, “formal” enforcement action refers to measures that have a statutory basis. As such, it does not include so-called “formal warnings” in this group, as formal in this context is simply referring to the fact that they are written. This can be contrasted with the position taken by some local authorities, which count written warnings as “formal enforcement action”: see, for example, Waikato Regional Council *2016/17 Annual Report* (2017) at 64. Note that some statutes, such as the Unsolicited Electronic Messages Act 2007, provide for statutory formal warnings (see s 23) and it can be observed that these have been suggested for the Environment Protection and Biodiversity Conservation Act 1999 (Cth): see Allan Hawke *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (October 2009) at 276.

<sup>159</sup> The number of substantiated complaints will be collected from the 2018/2019 financial year: see Ministry for the Environment, above n 151, at 13.

general plan rule monitoring detected breaches. The only data relating to detected breaches is the number of instances of resource consent non-compliance, which were presumably all technical RMA breaches and, perhaps, some substantive breaches (if, by chance, these occurred on the day the local authority was inspecting the resource consent).

What is apparent, however, is that there is a considerable amount of informal enforcement action taken in response to the (unknown number of) detected RMA breaches. This must be the case when, by way of example, in 2016/17 there were 13,289 instances of resource consent non-compliance (and presumably some of the 27,857 complaints and 2,993 instances of general plan rule monitoring resulted in detected RMA breaches) and only 3,344 formal enforcement actions.<sup>160</sup> Further, in some instances multiple enforcement actions will have been taken for one breach (for instance, both an infringement notice and an abatement notice may have been issued, and there may have been a number of each), reducing the number of detected breaches that were formally responded to.

## *2 Charges are brought infrequently (but usually successfully)*

Turning then to the make-up of the formal enforcement action, in 2016/2017 the directive route contained 1,876 abatement notices issued and 25 applications for an enforcement order, and on the punitive route there were 1,372 infringement notices issued and 71 prosecutions initiated.<sup>161</sup> The number of applications for enforcement orders and the number of prosecutions initiated cannot be directly compared to the number of abatement notices served and infringement notices issued (respectively). This is because, as set out in the paragraph above, one incident may have been dealt with by a number of infringement notices and abatement notices, which will have been counted separately, or by a prosecution or enforcement order application involving a number of defendants and charges, which will have been grouped and counted together. However, even taking this into account, prosecutions (and applications for enforcement orders) are far more infrequent than the other types of enforcement response.

The number of prosecutions has increased since the RMA was enacted. The prosecution studies record that between 1 October 1991 and 30 June 2001 there were 39 prosecutions per year, between 1 July 2001 and 30 April 2005 there were 45 prosecutions per year, between 1 May 2005 and 30 June 2008 there were 82 prosecutions per year and between 1 July 2008

---

<sup>160</sup> Ministry for the Environment, above n 29. See generally Brown, above n 123, at 39.

<sup>161</sup> Ministry for the Environment, above n 29.

and 30 September 2012 there were 101 prosecutions per year.<sup>162</sup> As noted in Chapter 1, the prosecutions studies have (acknowledged) limitations, relying on data sourced from legal databases and information provided by the local authorities, but the local authority surveys (which also have limitations) corroborate this somewhat, recording the number of prosecutions initiated as 81 in 2001/2002, 39 in 2003/2004, 86 in 2005/2006, 167 in 2007/2008, 135 in 2010/2011 and 104 in 2012/2013 (an average of 102 per year over this time period).

However, it would seem that there has been a decrease in the number of prosecutions in recent years. The National Monitoring System records that there were 81 prosecutions initiated in 2014/2015, 57 in 2015/2016 and 71 in 2016/2017.<sup>163</sup> This data also has limitations,<sup>164</sup> but the drop-off appears to be corroborated somewhat by the number of resolutions recorded in the Ministry of Justice data – there were 527 and 643 charges resolved in 2012/2013 and 2013/2014 respectively, which then reduced to 442, 353 and 387 charges in the following three years.<sup>165</sup> Similarly, the number of offenders who had RMA charges resolved against them was 175 and 174 in 2012/2013 and 2013/2014 (respectively), which then reduced to 153, 118 and 145 in the following three years.<sup>166</sup>

Although prosecution is infrequent, when a local authority does bring a case it will usually be successful. The position in the prosecution studies is somewhat unclear because, other than the fact that they do not include every decision, the successful cases and unsuccessful cases together do not add up to the total number of prosecutions, and nor is there any data on prosecutions that were withdrawn by the local authority.<sup>167</sup> However, even taking a

---

<sup>162</sup> Ministry for the Environment, above n 40, at 12.

<sup>163</sup> Ministry for the Environment “Enforcement actions” (2017) <[www.mfe.govt.nz](http://www.mfe.govt.nz)>.

<sup>164</sup> For instance, the Bay of Plenty Regional Council has zero prosecutions listed in 2016/2017, yet its Regulatory Compliance Report for the same year notes that “8 offences for the 2016/2017 period are currently before the courts”: see Bay of Plenty Regional Council, above n 135, at iv.

<sup>165</sup> Ministry of Justice, above n 41, at Appendix 1.

<sup>166</sup> At Appendix 1.

<sup>167</sup> For instance, the 2013 report records that 429 prosecutions were analysed, of which 395 resulted in a conviction, 8 were convictions and discharge, 14 were discharged without conviction and 7 were dismissed. Even counting “convictions and discharge” separately (even though they still technically come under conviction), this only totals 424: see Ministry for the Environment, above n 40, at 12 and 16. The local authority surveys are even less reliable with the question not having been asked until in 2010/2011 and respondents then simply asked how many “court decisions reached”, with no breakdown as to whether the prosecutions were successful and unsuccessful (Ministry for the Environment, above n 142, at 63). The number of court decisions reached and the number of convictions was asked in 2012/2013 (83 and 74 respectively, giving a conviction rate of 89%), but it is difficult to know how discharges without conviction were treated and whether a prosecution required some or all charges to result in convictions for it to be counted (see Ministry for the Environment *Resource Management Act: Survey of Local Authorities 2012/2013* (2014) at 76-78).

conservative approach, over 90% of the prosecutions appear to have been successful.<sup>168</sup> The success rate since 30 September 2012 is unknown, as there have been no further prosecution studies since 2013 and the Ministry of Justice data includes not only acquittals and charges dismissed in the group “Not proved”, but also charges withdrawn by the local authority.<sup>169</sup> There is, though, nothing to suggest that local authorities are achieving fewer guilty verdicts than previously.

However, this high success rate does little to bolster the certainty that a criminal penalty will be imposed when the number of prosecutions commenced is so low. Using 2016/2017 as an example, 71 prosecutions out of 3,344 formal enforcement actions out of an unknown number (but likely to be in the tens of thousands) of detected breaches suggests that the prospect of facing prosecution for a detected breach is slim. When one considers that many breaches are missed, as not all of the complaints made to local authorities are fully investigated (and there are issues with identifying the perpetrator even when a breach can be established), resource consent inspections will typically miss substantive breaches and there is only a limited amount of general plan rule monitoring undertaken, the certainty that a RMA breach will result in a criminal penalty appears to be low.

## *V Conclusion*

In this chapter, it has been shown that the courts and local authorities generally consider that the purpose of the RMA’s offences is to deter would-be offenders, which means that the effectiveness of the offences can be assessed by gauging their expected cost. If this is significant, then the offences will be a good deterrent, as it will need a correspondingly high expected benefit from breaching the RMA for a rational regulatee to offend. On the other hand, if the expected cost is low, then the offences will be a poor deterrent, as a correspondingly low expected benefit is all that will be needed before a rational regulatee will breach the Act.

The expected cost is made up of the severity of the penalties and the certainty that they will be imposed. It has been argued that the severity of the penalties is no more than moderate, given the usual penalty is a modest fine (as opposed to a more stringent alternative) and the secondary sanctions of a conviction and informal penalties typically provide little bolstering.

---

<sup>168</sup> Ministry for the Environment, above n 40, at 16. This success was usually achieved without a trial being required, with more than 80% of the prosecutions being resolved by the defendant pleading guilty.

<sup>169</sup> Ministry of Justice, above n 41, at Appendix 1.

It has also been argued that the certainty that a criminal penalty will be imposed is low, as many RMA breaches are being missed and, where a breach is detected, this rarely results in prosecution. Given, as noted in Chapter 3, certainty is generally considered to be the more important of the two variables, this suggests that the offences have a minimal expected cost, and so are ineffective. Of concern, it would appear that the position is not improving. Even though fines have been increasing, the number of prosecutions, while once rising, has started to decrease again, with such change coinciding (approximately) with the maximum penalty increase.<sup>170</sup>

The next chapter looks at the reasons why there is a low certainty that a criminal penalty will be imposed and why the penalties are of no more than moderate severity. In particular, this is considered from the perspective of the three parties that can influence these factors – the local authorities, the public and the courts – asking which parties are constrained from increasing the certainty and severity, and which are choosing to keep these factors low and only moderate (respectively).

---

<sup>170</sup> The maximum penalty increase took effect from 1 October 2009 (Resource Management (Simplifying and Streamlining) Amendment Act 2009, s 2), and in the local authority survey before this the number of prosecutions was listed as 167 (in 2007/2008). By the time of the next survey, in 2010/2011, this was down to 135, and it has been decreasing ever since to the point that the number of the prosecutions for 2014/2015, 2015/2016 and 2016/2017 have been, respectively, 81, 57 and 71.

## Chapter 5 – Explaining the Lack of Effectiveness: Constraints and Choices

---

### *I Introduction*

In the previous chapter, it was argued that the RMA's offences are ineffective. The primary purpose of the offences, according to the local authorities and the courts, is deterrence, but the offences are unlikely to be achieving this goal. The penalties imposed pursuant to them are of no more than moderate severity and this is then heavily discounted by the low probability that such a penalty will be imposed (which is generally considered the stronger factor). Together, this means that the expected cost of the offences is minimal, and as such it will only take a correspondingly low expected benefit from offending before a rational regulatee will breach the Act.

If deterrence is the primary goal, then what is keeping the severity of the penalties to no more than moderate and the certainty that a penalty will be imposed low? This is the topic of this chapter. The question is considered from the perspective of the three parties that can influence these factors, the local authorities, the public and the courts, again dividing the discussion into certainty (section II) and severity (section III). The overall argument advanced is that the ineffectiveness of the offences stems from constraints on both the courts and the public that stop them from pursuing deterrence, and choices made by councils to not in fact pursue deterrence, with the approach that local authorities take to prosecutions being distinctly “non-criminal”.

### *II Why Low Certainty?*

In this section, it is argued that there are two reasons why the certainty that a criminal penalty will be imposed remains low. First, local authorities do not prioritise either the detection of breaches or prosecution, typically applying only limited resources to compliance, monitoring and enforcement (compared to business-generating activities) and adopting approaches to enforcement that come from the “compliance family” (which favour lower-level measures). Second, the other party that could influence certainty, the public, are unable to convince local authorities to prosecute more or, in practice, bring proceedings themselves.

## *A Local Authorities Prosecute Sparingly*

### *1 Limited resources allocated to compliance, monitoring and enforcement*

As noted in the previous chapter, despite having a number of different ways of detecting non-compliance, it is likely that local authorities miss a lot of RMA breaches. Not all complaints are followed up in detail, resource consent inspections (when they happen) are unlikely to detect substantive breaches and there is only a limited amount of general plan rule monitoring undertaken. In explaining the reasons for this, the starting point is that local authorities invariably have limited resources and these must be allocated to a number of different areas.<sup>1</sup> There are certain mandatory requirements on local authorities, such as each region needing a regional policy statement<sup>2</sup> and a regional coastal plan,<sup>3</sup> and each district needing a district plan,<sup>4</sup> which require resources to prepare (and change). After this, most councils appreciate that compliance, monitoring and enforcement of activities undertaken pursuant to these plans is a necessary and vital part of their operations, but their focus is on growing the local economy through new businesses entering the region and expansions to existing operations. Such activities often need resource consents, so resources will next be allocated to the units responsible for processing these applications. Funding for compliance, monitoring and enforcement usually comes later.<sup>5</sup>

This is reflected in the relative numbers of staff involved in processing resource consents and those involved in compliance, monitoring and enforcement. For instance, in the last local authority survey (2012/2013) there were 704 fulltime equivalent (FTE) staff involved in processing resource consents and 436.7 FTE staff involved in compliance, monitoring and enforcement,<sup>6</sup> and by the first year of National Monitoring System data (2014/2015) the former had increased to 753 and the latter had dropped to 374.<sup>7</sup> After this, the number of FTE staff involved in processing resource consents saw an even more marked increase – to

---

<sup>1</sup> As Gunningham and Holley note, “since the very inception of environmental law, regulatory agencies have confronted the question of how they can best achieve environmental outcomes within their resource constraints. This has become a particularly vexing enquiry, as public budgets continue to shrink without a commensurate diminishment of regulatory responsibilities”: see Neil Gunningham and Cameron Holley “Next-Generation Environmental Regulation: Law, Regulation, and Governance” (2016) 12(1) *Annual Review of Law and Social Science* 273 at 281.

<sup>2</sup> RMA, s 60(1).

<sup>3</sup> Section 64(1).

<sup>4</sup> Section 73(1).

<sup>5</sup> Ministry for the Environment *Compliance, monitoring and enforcement by local authorities under the Resource Management Act 1991* (2016) at 17.

<sup>6</sup> Ministry for the Environment *Resource Management Act: Survey of Local Authorities 2012/2013* (2014) at 49 and 82.

<sup>7</sup> Ministry for the Environment *National Monitoring System for 2014/15* (2016); Ministry for the Environment, above n 5, at 17.



1,030 in 2015/2016 and 1,057 in 2016/2017.<sup>8</sup> On the other hand, there was a much smaller increase in the number of FTE staff involved in compliance, monitoring and enforcement – to 409 in 2015/2016 – followed by a small decrease – to 402 in 2016/2017. The number of FTE staff involved in processing resource consents is, therefore, well over twice the number of FTE staff involved in compliance, monitoring and enforcement, and the latter has not even returned to the 2012/2013 levels.

It is important to keep in mind that this preference for processing resource consents over compliance, monitoring and enforcement is simply a matter of prioritisation by the local authorities, rather than a necessity.<sup>9</sup> Put another way, there is no set ratio of resource consent (or plan-making) staff to compliance, monitoring and enforcement staff. However, it is unsurprising given the Fifth National Government’s emphasis on the processing of resource consents.<sup>10</sup> It is also tacitly acknowledged in the Ministry for the Environment’s Best Practice Guidelines for Compliance, Monitoring and Enforcement under the Resource Management Act 1991, published by the (at the time of writing, current) Sixth Labour Government, which state that councils need only have sufficient access to resources to support “monitoring high-risk resource consents, and most medium-risk resource consents”.<sup>11</sup> This suggests they can ignore the other medium-risk resource consents and low-risk resource consents. In a similar vein, the Guidelines state that councils need only have sufficient access to resources to support “responses to and investigation of *significant* incidents”,<sup>12</sup> which suggests that anything less can be disregarded.

## 2 Compliance approaches are adopted

The foregoing is one part of the answer as to why the certainty that a criminal penalty will be imposed remains low, but only a small part. Despite a number of breaches being missed, many others are detected. For instance, as set out in the previous chapter, in 2016/17 there were still 13,289 instances of resource consent non-compliance and presumably some of the

---

<sup>8</sup> Ministry for the Environment *National Monitoring System for 2015/16* (2017); Ministry for the Environment *National Monitoring System for 2016/17* (2018).

<sup>9</sup> Whyte makes this point in respect of funding as between the Police and the (central) Environmental Agency in the United Kingdom: see David Whyte “An intoxicated politics of regulation” in Hannah Quirk, Toby Seddon, and Graham Smith (eds) *Regulation and Criminal Justice* (Cambridge University Press, United Kingdom, 2010) at 171.

<sup>10</sup> For example, the Resource Management (Discount on Administrative Charges) Regulations 2010 require local authorities to give a discount on the application fee if they do not process resource consents within the statutory timeframes and the Resource Legislation Amendment Act 2017 saw the introduction of a 10 working day timeframe for processing “fast track” applications.

<sup>11</sup> Ministry for the Environment *Best Practice Guidelines for Compliance, Monitoring and Enforcement under the Resource Management Act 1991* (2018) at 33.

<sup>12</sup> At 33 (emphasis added).

27,857 complaints and 2,993 instances of general plan rule monitoring will have detected RMA breaches. However, this generated only 3,344 formal enforcement actions, of which a mere 71 were prosecutions.<sup>13</sup> The more important question, therefore, is why local authorities are so reluctant to bring charges.

The starting point is that there is a lack of legislative guidance and specific direction regarding how local authorities should go about the task of enforcement. In terms of legislative guidance, the only statutory instructions in the RMA regarding enforcement are the requirements that local authorities “enforce the observance” of their plans and any national environmental standards.<sup>14</sup> However, there appear to be no (statutory) consequences if these instructions are breached.<sup>15</sup> Further, the requirement that local authorities enforce their plans (which is the more relevant of the two) is not explicitly a key element of the RMA, it instead being buried in Part 5 (“Standards, policy statements, and plans”) under “Subpart 6 – Miscellaneous matters” and headed “Local authorities to *observe* their own policy statements and plans”.<sup>16</sup>

In terms of specific direction as to how to go about the task of enforcement, the Ministry for the Environment, on behalf of the Minister for the Environment,<sup>17</sup> is responsible for “monitoring of the effect and implementation of [the RMA] (including any regulations in force under it), national policy statements, national planning standards, and water conservation orders”.<sup>18</sup> However, the Ministry has traditionally provided only weak oversight and support to councils undertaking compliance, monitoring and enforcement under

---

<sup>13</sup> Ministry for the Environment, above n 8.

<sup>14</sup> RMA, ss 84(1) and 44A(8), respectively. Sections 30(1) and 31(1), covering the functions of regional councils and territorial authorities, and s 35, covering the duty to gather information, monitor, and keep records, also have some tangential relevance: see Ministry for the Environment, above n 11, at 12-13.

<sup>15</sup> A statutory remedy for a failure to enforce was recommended in the Resource Management Law Reform project: see Resource Management Law Reform Core Group *Enforcement and Compliance Issues in Resource Management* (Ministry for the Environment, Working Paper 30, November 1988) at 15. It was also suggested as an option in the government’s proposals (Ministry for the Environment *People, Environment, and Decision Making: the Government’s Proposals for Resource Management Law Reform* (December 1988) at 61-62) and supported in public submissions (Resource Management Law Reform Core Group *Public Submissions on “People, Environment, and Decision Making”* (Ministry for the Environment, Working Paper 32, April 1989) at 66-67). The Resource Management Law Reform process is discussed in more detail in Chapter 7.

<sup>16</sup> Emphasis added. This provision appears to have come from s 62(3) of the Town and Country Planning Act 1977, which provided that “[e]xcept as otherwise provided in this Act, while a district scheme is operative it shall be the duty of the Council, and of every other public body and local authority having jurisdiction within the district, in respect of any of the subject-matters of the scheme, to observe, and (to the extent of its authority) to enforce the observance of, the requirements and provisions of the scheme; and neither the Council nor any other public body or local authority nor any person shall thereafter depart or permit or suffer any departure from the requirements and provisions of the scheme.”

<sup>17</sup> Ministry for the Environment, above n 11, at 8.

<sup>18</sup> RMA, s 24(f).

the RMA.<sup>19</sup> For instance, Brown has summarised the Ministry’s “[p]rimary contributions” towards the oversight of local authorities during the first 25 years of the RMA as being:<sup>20</sup>

- Development of the RMA Enforcement Manual: cowritten by MfE and Local Government New Zealand (first published 1999) and now managed by Quality Planning (also now significantly out of date)
- Development of amending legislation and regulations that introduced infringement notices as an enforcement tool at the request of councils
- Collection and reporting on data from councils obtained previously through the RMA two-yearly survey of local authorities and, since 2015, through the NMS
- Collection of data and reporting on environmental outcomes under the Environmental Reporting Act 2015
- Production of research reports, including a series of four reports on the use of prosecutions (prepared externally and released periodically between 2001 and 2012) and a 2016 report on Compliance Monitoring and Enforcement of the RMA by local authorities

Of these, the first (the RMA Enforcement Manual, made up of seven guidance notes) and the last (the 2016 report on Compliance Monitoring and Enforcement of the RMA) are the most important for present purposes. The RMA Enforcement Manual provided advice to local authorities on how to (practically) use the various enforcement tools, but it was less helpful in terms of when to use each tool and it deferred to the local authorities.<sup>21</sup> The 2016 report noted a number of issues with enforcement under the RMA, in particular the significant variation in the way councils carry out compliance, monitoring and enforcement, which is probably no surprise given the framing of the (just mentioned) RMA Enforcement Manual.<sup>22</sup>

With the RMA Enforcement Manual becoming dated, and due to the issues identified in the Ministry’s 2016 report (and Brown’s report), the Ministry for the Environment has recently issued “Draft” and then “Final” Best Practice Guidelines for Compliance, Monitoring and

---

<sup>19</sup> Marie Brown *Last Line of Defence: Compliance, monitoring and enforcement of New Zealand's environmental law* (Environmental Defence Society, Auckland, 2017) at 34.

<sup>20</sup> At 34.

<sup>21</sup> For instance, it starts by stating that “[t]his manual provides general good practice information on RMA enforcement. When selecting an enforcement mechanism, follow the procedures and guidelines specific to your local authority. Particularly important are the priorities your local authority sets for compliance and enforcement, and any delegations used to manage risk in enforcement decision-making”: see Quality Planning *RMA Enforcement Manual* (2013). As noted in Chapter 4, Quality Planning is a partnership between the New Zealand Planning Institute, the Resource Management Law Association, Local Government New Zealand, the New Zealand Institute of Surveyors, the New Zealand Institute of Architects and the Ministry for the Environment.

<sup>22</sup> Ministry for the Environment, above n 5, at 5. The two other main conclusions were (also at 5) that resources for compliance, monitoring and enforcement are very limited in some councils (as to which, see the subsection above) and that there is a lack of data on compliance, monitoring and enforcement practices, which was referred to in the previous chapter.

Enforcement under the Resource Management Act 1991.<sup>23</sup> The purpose of these Guidelines is to “provide advice” on how local authorities should exercise the “considerable discretion in how they fulfil their statutory functions” to “achieve the purpose of the RMA”, and it is therefore worth considering them in more detail.<sup>24</sup>

It is apparent on reading the Guidelines that these largely favour approaches to enforcement from within the “compliance family”.<sup>25</sup> For instance, reference is made to the discretion that councils have, that a “strategic approach to compliance” is required and that interventions should be targeted “according to the individual or group’s willingness to comply combined with the seriousness of the breach”,<sup>26</sup> all of which are hallmarks of compliance approaches. Specifically in terms of the use of enforcement tools, the Ministry goes on to note that local authority enforcement budgets are typically capped, the consequence of this being that councils “may have to be selective about which prosecutions they take.”<sup>27</sup> As such, the Ministry is only prepared to go as far as saying that the “*best practice approach* is for councils to take the prosecution if it is warranted, regardless of potential costs to council or (partial) cost recovery through fines.”<sup>28</sup> At the same time, the Guidelines stress the importance of lower level enforcement responses. For instance, in talking about abatement notices, the Guidelines state that they should be an enforcement officer’s “primary tool”, which is based on the assertion that “[m]ost abatement notices issued are eventually complied with” and “so it can be a cost-effective way of achieving positive behaviour change”.<sup>29</sup>

---

<sup>23</sup> Ministry for the Environment *Draft Best Practice Guidelines for Compliance, Monitoring and Enforcement under the Resource Management Act 1991* (2018) and Ministry for the Environment, above n 11. Interestingly, the Ministry’s draft guidelines noted that some of the Quality Planning content was out of date and these guidelines would replace the compliance, monitoring and enforcement content (at 8), but this comment was omitted from the final guidelines (at 9). However, it is clearly the case that some of the content is out of date – for instance, the enforcement section still refers to the procedure for commencing a prosecution as being set out in the Summary Proceedings Act 1957, which was replaced by the Criminal Procedure Act 2011 many years ago.

<sup>24</sup> Ministry for the Environment, above n 11, at 9.

<sup>25</sup> See the discussion in Chapter 3 regarding persuasive compliance, insistent compliance, responsive regulation, smart regulation and really responsive regulation, all of which come within the “compliance family”. For ease of use, the term “compliance” is used from this point on to refer to approaches from the “compliance family”.

<sup>26</sup> Ministry for the Environment, above n 11, at 17-19.

<sup>27</sup> At 40.

<sup>28</sup> At 40 (emphasis added).

<sup>29</sup> At 88. The Ministry could, perhaps, point to the low number of appeals against abatement notices as evidence for this – in the 2015 calendar year there were only 35 appeals, in the 2016 calendar year there were only 26 appeals, and in the 2017 calendar year there were only 36 appeals (Environment Court of New Zealand *Annual Review Calendar Year 2015* at 14; Environment Court of New Zealand *Annual Review Calendar Year 2016* at 13; Environment Court of New Zealand *Annual Review Calendar Year 2017* at 10), compared to approximately 2,000 abatement notices issued each year - but it is suggested that the low number of appeals can equally be attributed to many people deciding not to challenge the abatement notice if they have already done what was demanded, or they do not consider they can do what is being asked of them (for instance, if they have no

Turning then to the individual enforcement policies of councils, the first point to note is that not every local authority has one. For instance, Brown found that, as at 2016, only 37% of local authorities (26% of district councils, 36% of city councils, 73% of regional councils and 67% of unitary councils) had such a policy in place.<sup>30</sup> However, those that do also typically subscribe to compliance approaches to enforcement. For instance, as with the Ministry's Guidelines, reference is frequently made to the wide range of tools available, the broad discretion local authorities have,<sup>31</sup> and the need for "proportionality" between the breach and the enforcement response.<sup>32</sup>

When it comes to the circumstances in which prosecution will be used, there are a variety of approaches set out in the individual enforcement policies. Some councils are quite brief – for instance, the Bay of Plenty Regional Council in its *2016/2017 Regulatory Compliance Report* notes that "[p]rosecutions are generally reserved for more serious offences where significant environmental effects have occurred, or where there has been repeated serious non-compliance".<sup>33</sup> Similarly, the Taranaki Regional Council's Enforcement Provisions and Procedure under Resource Management Act (sic) states that the Council's process of enforcement is a "staged one of assistance and warnings in the form of inspections, Abatement Notices and Infringement Notices, leading only if necessary, to Prosecution", although prosecution may be "considered in the first instance if the nature, circumstance and effects of an offence are serious enough to warrant it".<sup>34</sup> On the other hand, some local authorities list a large number of relevant matters – for instance, the actual and potential adverse effects on the environment, whether the breach was as a result of deliberate, negligent or careless action, whether there was a failure to act on prior instructions, advice or notice, and so on – and then simply say that a "prosecution may be considered appropriate

---

practical control over the matter). Regardless, the "primary tool" reference is unfortunate, because it fails to recognise that abatement notices are on the "directive" pathway, and so these will not be appropriate when a "punitive" response is required.

<sup>30</sup> Brown, above n 19, at 46. It can be observed that the Australian Law Reform Commission has recommended that "[r]egulators who administer legislation under which criminal, civil or administrative penalties may be imposed or arise should develop and publish enforcement guidelines setting out their enforcement approach", and that this should cover (unless clearly inappropriate) the types of action available, the principles behind each action, the criteria involved in the decision to pursue one or more of the actions and the regulator's relationship with other regulators and enforcement agencies: Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC R95, 2002) at 388-389.

<sup>31</sup> See, for example, Environment Canterbury *Compliance Monitoring and Enforcement Guidelines 2010* at 3.

<sup>32</sup> See, for example, West Coast Regional Council *Enforcement Policy* (2013) at 2; Waikato Regional Council *Enforcement Policy* (2016) at 5. See generally Ministry for the Environment, above n 11, at 11-12.

<sup>33</sup> Bay of Plenty Regional Council *2016/2017 Regulatory Compliance Report* (2017) at 53.

<sup>34</sup> Taranaki Regional Council *Enforcement Provisions and Procedure under Resource Management Act* (2017) at 47.

when the factors listed...indicate that the matter is sufficiently serious to warrant the intervention of the criminal law”.<sup>35</sup>

However, regardless of the exact approach stated, what is common is that these all point to prosecution being used infrequently. Indeed, if councils are using formal warnings for a “minor to moderate incident”,<sup>36</sup> or infringement notices for “*serious* non-compliance offences which do not warrant further action”,<sup>37</sup> then for some councils the threshold for prosecution is very high. Such an approach is sometimes referred to in the literature as “last resort”,<sup>38</sup> but it is probably more accurate to say here that local authorities will prosecute only as a “last resort” (that is, when all other options have failed) or where the damage caused is suitably severe, and in many instances both are in fact present. The distinction between the two circumstances in which local authorities will prosecute, and the ramifications, will be returned to in the next chapter, but in the remainder of this section the reasons why local authorities have adopted compliance approaches to enforcement are discussed. In particular, it seems likely that this is because they cost less than deterrence approaches and they are more politically palatable.<sup>39</sup>

As noted above, a local authority’s compliance, monitoring and enforcement resources are typically scarce and most councils have caps on their enforcement budgets. This gives a major incentive to deal with matters informally (either by way of a verbal warning or letter) or at a lower level (say, an abatement notice or infringement notice), given the lesser cost associated with these responses. This lower cost is obvious in the case of informal measures,

---

<sup>35</sup> See, for instance, Marlborough District Council *Enforcement Policy* (2018) at 16. The full list of factors is (at 12): “• What were, or are, the actual adverse effects on the environment? • What were, or are, the potential adverse effects on the environment? • What is the value or sensitivity of the receiving environment or area affected? • What is the toxicity of discharge? • Was the breach as a result of deliberate, negligent or careless action? • What degree of due care was taken and how foreseeable was the incident? • What efforts have been made to remedy or mitigate the adverse effects? • What has been the effectiveness of those efforts? • Was there any profit or benefit gained by alleged offender(s)? • Is this a repeat non-compliance or has there been previous enforcement action taken against the alleged offender(s)? • Was there a failure to act on prior instructions, advice or notice? • Is there a degree of specific deterrence required in relation to the alleged offender(s)? • Is there a need for a wider general deterrence required in respect of this activity or industry? • Was the receiving environment of particular significance to iwi? • How does the unlawful activity align with the purposes and principles of the RMA? • If being considered for prosecution, how does the intended prosecution align with Solicitor-General’s Prosecution Guidelines?”.

<sup>36</sup> Environment Southland *Compliance Policies* (2017) at 19.

<sup>37</sup> Bay of Plenty Regional Council, above n 33, at 52 (emphasis added).

<sup>38</sup> See, for example, Keith Hawkins *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (Oxford University Press, Oxford, 2002).

<sup>39</sup> As Ashworth notes, “[i]f it transpires that the real argument is that the various inspectorates have insufficient resources to mount more prosecutions, and therefore use the compliance approach partly for cost reasons, then we must accept that the debate has shifted to a rather different terrain”: Andrew Ashworth “Is the Criminal Law a Lost Cause?” (2000) 116 *Law Quarterly Review* 225 at 248.

but infringement notices and abatement notices are also quick and inexpensive to prepare. This is because there are standard forms for each,<sup>40</sup> they are issued by an enforcement officer who will not need to consult with an enforcement decision group (and in some circumstances, not even with his or her manager),<sup>41</sup> and legal advice will also typically not be required. If the local authority is ever challenged it can simply cancel the abatement notice,<sup>42</sup> or decline to pursue the infringement notice to hearing.

On the other hand, prosecuting is time-consuming and expensive.<sup>43</sup> As set out in a 2016 report by the Ministry for the Environment, the costs of prosecution can be “considerable”, in that:<sup>44</sup>

...a simple legal opinion prior to filing charging documents may cost around \$3000-\$5000. A case involving an early guilty plea by a single defendant facing a single charge may be resolved with legal expenses to council of less than \$10,000. If charges are defended and the matter is particularly complex, however, then legal expenses can easily run to six figures.

Indeed, even undefended cases can cost a local authority hundreds of thousands of dollars. For instance, as noted in Chapter 1, in *Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd* the sentencing Judge, after imposing a fine of \$288,000 for a guilty plea at the first available opportunity to a charge of discharging a contaminant into water, noted that the Council’s actual costs in relation to the prosecution had been over \$300,000.<sup>45</sup> Further, it took just over a year from the incident to sentencing, meaning that Council staff will have been tied up in the proceeding, in one form or another, for this time.<sup>46</sup>

Another relevant factor is that councils have a tendency to be risk averse when it comes to prosecuting. Although the Solicitor-General’s Prosecution Guidelines only state that the evidence required in order to commence a prosecution be “sufficient to provide a reasonable prospect of conviction”, councils appear to apply a heightened standard, somewhat akin to

---

<sup>40</sup> Resource Management (Forms, Fees, and Procedure) Regulations 2003, Form 48 Abatement Notice and Resource Management (Infringement Offences) Regulations 1999, Schedule 2 Form of infringement notice.

<sup>41</sup> Brown, above n 19, at 47.

<sup>42</sup> RMA, s 325A.

<sup>43</sup> The Ministry for the Environment’s “Draft” Best Practice Guidelines for Compliance, Monitoring and Enforcement under the Resource Management Act 1991 stated that the “significant costs of taking prosecutions can therefore deter councils from taking this action” (Ministry for the Environment, above n 23, at 39), but this sentence was omitted from the final guidelines, the Ministry preferring to highlight that “[t]he costs and risks of taking prosecutions can, however, be substantially reduced if the prosecution is run well, and councils engage specialist investigative staff” (Ministry for the Environment, above n 11, at 40).

<sup>44</sup> Ministry for the Environment, above n 5, at 25.

<sup>45</sup> *Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd* [2016] NZDC 8903 at [59].

<sup>46</sup> The incident occurred on 27 April 2015 and sentencing took place on 16 May 2016: at [10].

“no chance of failure”.<sup>47</sup> This means that, when they decide to prosecute, they will likely spend more time and money ensuring that the case is “watertight”, leaving less room in the enforcement budget for other cases. There are various reasons for this risk adversity, including that local authorities are concerned about having costs awarded against them if a prosecution is unsuccessful,<sup>48</sup> but even more than the cost, because councils prosecute relatively rarely, being successful means a lot to them from a reputation perspective.<sup>49</sup>

The next point is that it is not only cost, but also recovery that is important to local authorities when it comes to enforcement. For instance, the West Coast Regional Council’s Enforcement Policy states first that the Council “will [endeavour] to undertake its duties in a clear and speedy manner that gives effect to the purpose and principles of the RMA while minimizing costs to the ratepayer”.<sup>50</sup> Then, after noting that it “must often make decisions associated with the allocation of finite resources to areas of highest priority”, it states that “[i]n order to ensure this principle is not compromised through a lack of funds, the Council intends to recover the costs associated with enforcement where possible”.<sup>51</sup>

However, a local authority’s ability to recover its costs relating to compliance and monitoring is variable. Local authorities are permitted to “fix charges” on resource consent holders for “the carrying out by the local authority of its functions in relation to the administration, monitoring, and supervision of resource consents”,<sup>52</sup> but the recovery of costs associated with permitted activity monitoring appears to be limited to situations where the council has, in a bylaw, prescribed fees or charges for inspections, and then undertaken such an inspection

---

<sup>47</sup> Crown Law Office *Solicitor-General’s Prosecution Guidelines* (2013) at 5.1.1.

<sup>48</sup> In extreme cases, such an award can be considerable (see, for example, *Wallace Corporation Ltd v Waikato Regional Council* [2012] NZHC 1420), but awards of costs against local authorities are in fact relatively rare – a search of Westlaw NZ reveals only two first instance cases between 1 October 2012 and 30 June 2017 where costs have been awarded against local authorities following an unsuccessful prosecution – *Southland Regional Council v Euan Shearing Contracting Ltd* DC Invercargill CRN11025501005 & 9, 16 October 2012 and *Rochford v Selwyn District Council* [2017] NZDC 12640. In another case the Judge indicated that he would be prepared to award costs “approaching full and actual” and asked the parties to attempt to resolve the matter without further input from the Court (*Auckland Council v Kelly* [2015] NZDC 16484 at [120]–[121]), and in another costs were awarded following a successful appeal against conviction: *Carruthers v Otago Regional Council* [2014] NZHC 2212. Further, even when an award is made it is usually relatively insignificant compared to the cost of prosecuting generally – in terms of the two first instance cases referred to above, in *Southland Regional Council v Euan Shearing Contracting Ltd* the defendants were awarded \$5,000, and in *Rochford v Selwyn District Council* the defendant was awarded \$2,000. For a discussion on costs awards against regulators generally, see *Registrar of Companies v Feeney* [2011] NZHC 863 at [35].

<sup>49</sup> Hawkins refers to this as the “posture of invincibility”: Keith Hawkins *Environment and Enforcement: Regulation and the Social Definition of Pollution* (Clarendon Press, Oxford, 1984) at 190.

<sup>50</sup> West Coast Regional Council, above n 32, at 3.

<sup>51</sup> At 3.

<sup>52</sup> RMA, s 36(1)(c).



under s 332(1) of the RMA.<sup>53</sup> Further, there are no specific recovery provisions relating to complaints.<sup>54</sup> Infringement notices have the added benefit, therefore, that not only are they quick and inexpensive, the local authority that issued it gets the full fee.<sup>55</sup> Further, where non-compliance resulted from monitoring/inspection of a resource consent, the local authority can also recover the costs associated with issuing an abatement notice or, somewhat strangely given these are a monetary penalty in themselves that goes to the council, the costs associated with issuing an infringement notice.<sup>56</sup>

It is, of course, the case that local authorities get (at least, but not usually more than) 90% of any fines imposed in any prosecutions they bring.<sup>57</sup> However, there is no guarantee that this will cover the cost of prosecuting, or that it will even be recovered.<sup>58</sup> In terms of the former, even the fine of \$288,000 in *Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd*, let alone 90% of it, reportedly did not cover the costs of prosecuting.<sup>59</sup> In terms of the latter, the Ministry for the Environment has noted that there “are a number of substantial RMA fines that have never been recovered by the Ministry of Justice and the fines have been ‘remitted’, often due to a company going into liquidation or receivership, or the offender absconding.”<sup>60</sup>

That cost-effectiveness is likely to be a significant factor is no real surprise. A “[l]ack of resources for compliance function” and the “[h]igh cost of enforcement processes” were,

---

<sup>53</sup> Local Government Act 2002, s 150(1)(b). Brown notes that some councils simply invoice the transgressor in other situations, expecting (or perhaps hoping) it will be paid without legal challenge: Brown, above n 19, at 43-44. An example of this would seem to be the West Coast Regional Council, the enforcement policy of which states “[w]here the Council incurs costs in avoiding, remedying, or mitigating adverse effects caused by or on behalf of any person, or in relation to land owned by such a person, from contravention of the RMA, that person will be invoiced to recover any costs incurred by The West Coast Regional Council”: West Coast Regional Council, above n 32, at 3. However, it is unclear what the legal basis for this is, as the ability of a local authority to recover these types of costs generally comes from the granting of an enforcement order: see RMA, s 314(1)(d).

<sup>54</sup> Interestingly, Environment Southland notes, in its 2016/2017 Compliance Monitoring Report, that “[t]he costs involved in attending and investigating an incident are charged where an offending party can be identified” (Environment Southland *Environmental Compliance Monitoring Report 2016/17* (2017) at 55), although it does not state what the legal basis is for doing so. Further, it goes on to note that (at 55) “[u]nfortunately, many of the incidents attended do not identify the offending party. In these cases where mitigation action has to be taken to cease an environmental effect such as the removal of litter, rubbish and dead stock from waterways, the cost of such action is met by the ratepayer.”

<sup>55</sup> RMA, s 343D. Further, it has been proposed that these fees increase: see Cabinet Paper *Proposed Resource Management Amendment Bill: Stage 1 of a resource management system review* (2018) at [64]-[65]; Resource Management Amendment Bill 2019 (180-1).

<sup>56</sup> Ministry for the Environment, above n 11, at 38-39.

<sup>57</sup> RMA, s 342. This is discussed in more detail in section IIIB below.

<sup>58</sup> Ministry for the Environment, above n 11, at 40.

<sup>59</sup> *Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd*, above n 45, at [59].

<sup>60</sup> Ministry for the Environment, above n 5, at 25. See also the discussion in section IIIB below about the non-payment of fines in *Northland Regional Council v Beejay Stud Ltd* DC Whangarei CRI-2016-088-759-760, 26 October 2016 and *Northland Regional Council v Clear Ridge Station Ltd* DC Whangarei CRI-2016-088-403, 26 October 2016.

respectively, the two biggest challenges identified by respondents to Brown’s survey of RMA compliance, monitoring and enforcement by local authorities.<sup>61</sup> However, it is suggested that there is one final factor relating to the adoption of compliance approaches, and that is “political palatability”. What is meant by this is that informal and low-level enforcement measures are likely seen by the enforcement units of local authorities as more acceptable to elected officials, with prosecution only considered by councillors to be appropriate when there is no other option.

The starting point is that monitoring and enforcement is sometimes viewed in a dim light by regulated parties. This is, of course, not universal – many people and businesses, typically those that are complying, understand the importance of it to, at least, maintain a level playing field, even if they are sometimes sceptical as to the positive effects on the environment that it has – but it is often the case that many in the community are resistant. For instance, in terms of monitoring, recent reports that the Waikato Regional Council was reinstating the aerial surveillance of farms drew a backlash from some farmers.<sup>62</sup> Further, in terms of enforcement, the sentencing Judge in *Waikato Regional Council v Hold The Gold Ltd* expressed concern at the criticisms the community had made of the Council in deciding to prosecute the defendants, and tried to ameliorate these by setting out in detail the Council’s responsibilities in enforcing the RMA.<sup>63</sup>

This is important because certain sectors of the regulated community are often powerful and have influence with councils, and may even be represented (and sometimes in the majority) at the councillor level.<sup>64</sup> It is no surprise then that there is a view that elected officials can, at times, see formal enforcement action as “undesirable”,<sup>65</sup> with some councillors even running for office on the basis that, if elected, they will amend the council’s enforcement practices.<sup>66</sup>

---

<sup>61</sup> Brown, above n 19, at 54. Brown notes this is consistent with the last survey conducted by the Ministry for the Environment: see Ministry for the Environment, above n 6, at 13.

<sup>62</sup> Elton Smallman “High-risk farms the focus as aerial monitoring looks to make a return” *Stuff* (online ed, Wellington, 25 June 2018)

<sup>63</sup> *Waikato Regional Council v Hold The Gold Ltd* DC Hamilton CRN14019501673-74, 19 December 2014 at [25] and [30] (respectively). It can also be noted that, despite the prosecutor and defendant both submitting that the latter should simply be convicted and discharged, the sentencing Judge disagreed and convicted the defendant and fined it \$16,875, noting (at [56]) that “this decision will in all likelihood not be welcomed by all of those in the dairy farming industry”. See also, in respect of a prosecution by the Kapiti Coast District Council that attracted public ire: Robert Fowler *Review of Oriwa Crescent prosecutions* (Kapiti Coast District Council, August 2014).

<sup>64</sup> See, for instance, the allegations levelled by the then opposition Environment and Water spokesperson, David Parker, against Environment Southland, as reported in Evan Harding “Environment Southland faces blowtorch over declining freshwater quality” *Stuff* (online ed, Wellington, 21 May 2017).

<sup>65</sup> Brown, above n 19, at 37.

<sup>66</sup> Ministry for the Environment, above n 5, at 27.

Further, in some local authorities, councillors have been involved with specific enforcement decisions,<sup>67</sup> despite the inappropriateness of this.<sup>68</sup> Indeed, even when they are not formally involved there is evidence that councillors can make their dislike for prosecution known in other ways.<sup>69</sup> For instance, the minutes of the Resource Management Committee of the West Coast Regional Council record one councillor giving his view that a matter that resulted in a successful prosecution should instead have been “sorted out on site, as this was a day’s work on a digger”, and expressing “his concern at what this could cost”.<sup>70</sup> While another councillor supported the prosecution, noting that “Council’s last option is legal proceedings and in this case Council has gone through exactly the right processes”,<sup>71</sup> the fact that councillors are openly discussing specific cases – even concluded ones – means that compliance staff will therefore be aware of their views on enforcement generally, and this may affect their decision-making in future cases.

These views on enforcement action are likely to then filter down to the compliance, monitoring and enforcement unit of the local authority. For instance, there is evidence that, at least in some small councils, staff feel pressure to adopt informal measures to deal with non-compliance.<sup>72</sup> However, in some cases warnings or letters will not be enough due to the extent or nature of the breach, and it is here that infringement notices and abatement notices become such powerful tools. This is because they “count” as a formal enforcement action, in just the same way that prosecutions do, and so can give the impression that the council is taking a matter more seriously than it perhaps is.<sup>73</sup>

---

<sup>67</sup> At 26-27; Brown, above n 19, at 48.

<sup>68</sup> Office of the Auditor-General *Managing freshwater quality: Challenges for regional councils* (September 2011) at 59-68.

<sup>69</sup> As the more recent Auditor-General’s report states, “[s]ince 2011, the four regional councils have made significant procedural improvements to ensure that elected members are not involved in decision-making processes for prosecuting non-compliance. Despite these improvements, there are still opportunities for elected members to exert inappropriate influence. Councils must remain alert to this issue”: Office of the Auditor-General *Managing freshwater quality: Challenges and opportunities* (September 2019) at 60.

<sup>70</sup> West Coast Regional Council *Minutes of the Meeting of the Resource Management Committee* (10 October 2017) at 3.

<sup>71</sup> At 3.

<sup>72</sup> Ministry for the Environment, above n 5, at 28-29. The Ministry goes on to note, however, that this is not universal.

<sup>73</sup> One example of this may be the issuing of 27 infringement notices by Environment Canterbury to Bathurst Coal Limited, as a result of sediment run-off from its recently consented mining development (see Liz McDonald “Canterbury coalmine fined after runoff endangers fish habitat” *Stuff* (online ed, Wellington, 20 November 2017); Michael Wright “Bathurst Resources fined \$10,000 for environmental breaches at Canterbury mine” *Stuff* (online ed, Wellington, 23 January 2018)). On the face of it, this is significant action, as the penalties together total nearly \$20,000. However, when it is considered that Environment Canterbury described it as a “very serious issue”, and that Bathurst Coal Limited’s ultimate holding company had earnings before interest, taxes, depreciation and amortisation for the year of \$11.3 million (see Bathurst Resources Limited

### *B The Public is Constrained from Increasing the Number of Prosecutions*

Before moving on to consider the reasons why the severity of the penalties is no more than moderate, it must be asked why, if local authorities are treating detected breaches too leniently, the public is not, either individually or in groups, seeking to change this. There are two main ways it could do so, by pressuring councils to prosecute instead of using informal or low-level means, or by gathering evidence and undertaking private prosecutions.<sup>74</sup> However, it is suggested in this subsection that neither of these options is practical, for three (related) reasons.

First, many RMA breaches have no direct victim, and as such there is often no-one that the local authority must explain itself to if it decides not to prosecute, or anyone with a sufficient personal interest to bring proceedings themselves. Related to this, complaints are likely to be from a member of the general public, so they too can be expected to be less inclined to follow up with the council regarding what – if any – action was taken, or to take action themselves.<sup>75</sup> While various non-government organisations are acutely interested in RMA non-compliance, their focus has tended to be on (what they consider to be) broader trends, rather than intervening in specific cases.<sup>76</sup>

This is perhaps because of the second reason, that there is a dearth of publicly available information about breaches. Local authorities tend to only publicise those cases that result in successful prosecution and are unlikely to proactively report on serious incidents that get resolved by low level measures or informally, such as where the party at fault has remediated the damage and no action is taken.<sup>77</sup> By the time the breach comes to light, it may be too late

---

*Annual Report* (2017) at 11), such a penalty is unlikely to have much effect on this company. A subsequent prosecution of Bathurst Coal Ltd is discussed in Chapter 6.

<sup>74</sup> Pursuant to s 15 of the Criminal Procedure Act 2011, any person may commence a proceeding.

<sup>75</sup> Compare the arrangements set out in the Health and Safety at Work Act 2015, whereby people can express an interest in a case (s 142) and the regulator has “first right of refusal” to bring a prosecution (s 143), but if the regulator chooses not to do so they must notify those with an expressed interest and they may take a private prosecution (s 144). Compare also the situation referred to by Brown where Greenpeace organised for 15,000 standard-form emails to be sent to the Environmental Protection Agency after the Agency decided not to prosecute Shell Todd Oil under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 for drilling two extension wells off the Taranaki coast without approval: see Brown, above n 19, at 56.

<sup>76</sup> See, for instance, Forest & Bird *Cleaning Up: Fixing compliance, monitoring and enforcement in the dairy sector* (August 2018).

<sup>77</sup> This was, essentially, the allegation levelled at Environment Southland in relation to an oil spill in central Southland and reported in Evan Harding “Environment Southland didn’t tell public of 23,700-litre oil spill” *Stuff* (online ed, Wellington, 10 July 2017). In response, Environment Southland issued a public statement (Environment Southland “Public statement: 2015 Oil spill response” (press release, 14 July 2017)) stating that the incident was reported at the time, albeit in the Otago Daily Times rather than The Southland Times (see Shawn McAvinue “Oil spills after truck rolls in Southland” *Otago Daily Times* (online ed, Dunedin, 30 October 2015), but it would be fair to say that the article was fairly sparse on detail. Environment Southland also

for the local authority to change its mind, or for an individual to prosecute the transgressor themselves. This is because, under s 338(4) of the RMA, the limitation period for bringing a prosecution ends “6 months after the date on which the contravention giving rise to the charge first became known, or *should have become known, to the local authority or consent authority*”.<sup>78</sup> This means a situation could arise where a local authority should have known about a contravention (but did not), and because six months has passed a member of the public, despite only recently learning about the breach, cannot prosecute.

Third and finally, private individuals face a number of other hurdles if they want to bring a prosecution themselves. They do not have access to the inspection provisions – for instance, the power of entry for this purpose is limited to enforcement officers<sup>79</sup> – and the cost to them of bringing a prosecution is likely to be prohibitively expensive.<sup>80</sup> Perhaps most galling is that, even if an individual did bring a prosecution and was successful, his or her only avenue for recovery of costs incurred would be the Costs in Criminal Cases Act 1967 (which, as discussed in the next section, is limited), as s 342(1) of the RMA (which provides that 90% of the fine is returned to the party bringing the proceedings) is restricted to local authorities.<sup>81</sup>

### *III Why No More than Moderate Severity?*

This section suggests reasons why the penalties imposed on people that have been successfully prosecuted for breaching the RMA are of no more than moderate severity. It is first argued that criminal sentencing orthodoxy has meant that Environment Judges can only impose fines in RMA cases that are, on average, at a modest level. It is then argued that local authorities still prefer fines as the *type* of primary sentence imposed (sometimes with a

---

advised that it had improved its “response and communication protocols, equipment and training”. This case is discussed in more detail in Chapter 6.

<sup>78</sup> Emphasis added. It can be observed that the government is proposing to extend the time limit to 12 months: see Cabinet Paper, above n 55, at [66]; Resource Management Amendment Bill 2019 (180-1), cl 62.

<sup>79</sup> RMA, s 332.

<sup>80</sup> Ministry for the Environment, above n 11, at 71.

<sup>81</sup> Compare s 77 of the Dog Control Act 1996, which provides that “[n]otwithstanding anything in section 73 of the Public Finance Act 1989, the court before which any person is convicted of an offence against this Act may direct that part (not exceeding one-half) of any fine imposed shall be paid to the person who commenced the proceedings or to any person giving information that led to the conviction”: see section 77. It is not the case that all such provisions post-date the RMA, as a provision similar to this has been in force since at least 1880 – see the Dog Registration Act 1880, s 24, which provided that “[a]ll fees, fines, and penalties received under this Act shall be paid by the person receiving the same into the District Fund: Provided, however, that one moiety of every fine or penalty imposed under this Act may, if the convicting Justices so direct, be paid to the person or persons who shall sue for the same, or who shall give such information as may lead to conviction”. On the importance of evidence-gathering abilities, cost and recovery to the enforcement of environmental laws by the public, see generally Wendy Naysnerski and Tom Tietenberg “Private Enforcement” in Tom Tietenberg (ed) *Innovation in environmental policy: economic and legal aspects of recent developments in environmental enforcement and liability* (EE Elgar, Aldershot, 1992).

“compliance-focussed” enforcement order), as opposed to other, potentially more deterrent, penalties,<sup>82</sup> and they do not “use” convictions or leverage prosecutions to create informal penalties, because their focus is on reparative outcomes.<sup>83</sup>

### *A The Courts are Constrained from Imposing Higher Fines*

As noted in the previous chapter, the fine is the predominant sentence imposed by the courts for RMA offending, and it is undoubtedly true that average fine levels have increased. This is especially the case since the 2009 amendments to the maximum penalty, although this more recent rise has come at the same time as the number of prosecutions initiated has fallen, meaning that this did not necessarily lead to an increase in the expected cost of the offences. Further, average fines per prosecution are still only, at most, approximately 12% of the maximum penalty the Court can impose, and so while some specific fines are considerable, overall fine levels are only modest.<sup>84</sup>

In light of the analysis in section II of this chapter, this point can now be put another way. The Sentencing Act 2002 provides that the maximum monetary penalty (here \$300,000 for natural persons and \$600,000 for non-natural persons) should be imposed for offending “within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate”.<sup>85</sup> At the other end of the scale, the defendant should simply be convicted and discharged if the offending is within the least serious of cases. Average fines per prosecution of around \$35,000 suggest that offending is typically (much) closer to the least serious end of offending, yet this is at odds with the approach taken by local authorities, set out in the section above, of prosecuting only as a “last resort” (that is, when all other options have failed) and/or where the damage caused is severe.

---

<sup>82</sup> Non-monetary penalties for individuals, “punitive” enforcement orders and resource consent reviews.

<sup>83</sup> The reason why fines for RMA offences can be seen as “reparative” outcomes is explained in section IIIB below.

<sup>84</sup> Some perspective is required on these significant fines too. For instance, the defendant in *Maritime New Zealand v Daina Shipping Company* DC Tauranga CRI-2012-070-1872, 26 October 2012 had already, together with its insurers, agreed to pay \$27.6m in compensation to the Crown (and potentially more), with a further \$235m paid towards salvage and clean-up, so a fine of \$300,000 was minimal in the scheme of matters. Similarly, the parent company of the defendant in *Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd*, above n 45, had earned US\$16.2 billion in the previous year, and the defendant itself had a net income of NZ\$60 million in that year (see Bay of Plenty Regional Council “*Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd - Agreed Summary of Facts*” (2016) Bay of Plenty Regional Council <[www.boprc.govt.nz](http://www.boprc.govt.nz)> at [2]), so a fine of \$288,000 would similarly have been relatively immaterial.

<sup>85</sup> Sentencing Act 2002, s 8(c). Similarly, the courts must impose “a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate”: s 8(d).

If Environment Judges have accepted that deterrence is (usually) the primary purpose of RMA sentencing – and it was argued in the previous chapter that there is considerable evidence that they have – the question that needs to be asked is why they continue to impose fines that are only modest, especially when so few prosecutions are brought. Overseas, low fines are sometimes attributed to the absence of specialist Judges,<sup>86</sup> but this is obviously not the case here, with all prosecutions heard by an Environment Judge (unless otherwise directed by the Chief District Court Judge).<sup>87</sup> Rather, it is argued in this section that fine levels are only modest because Environment Judges are required to follow orthodox criminal sentencing practice, which limits these penalties in two ways. First, it means that, despite deterrence being the goal, the judges cannot apply deterrent models when calculating penalties, instead being forced to apply a desert-based approach that, in the context of the RMA, tends to restrict starting point levels. Second, the judges believe that they must give defendants a range of discounts from, and are rarely able to uplift, the starting point in determining the end fine.

### *1 Desert, not deterrence, to set starting points*

If deterrence is the primary purpose of sentencing then this suggests that sentences should, at least in the first instance, be driven by deterrent models.<sup>88</sup> The penalties according to such models are generally based on either the harm caused or the benefit to the offender,<sup>89</sup> and are known as optimal deterrence and absolute deterrence (respectively).<sup>90</sup> More specifically, optimal deterrence weighs up the social costs and social benefits of non-compliance, only seeking to deter conduct for which the former is greater than the latter. Economists generally argue that the benefits to the offender should be included in this assessment,<sup>91</sup> which can be considered controversial in offences such as murder and assault,<sup>92</sup> but is arguably more appropriate in regulatory matters given the connotations in the term “regulation” of

---

<sup>86</sup> See, for example, Philip Hampton *Reducing administrative burdens: effective inspection and enforcement* (HM Treasury (UK), March 2005) at 39-40; Cabinet Office (UK) *Regulatory Justice: Sanctioning in a post-Hampton World* (2006) at 14.

<sup>87</sup> RMA, s 309(3)(b). Having specialist environmental Judges, as opposed to specialist criminal (or even generally warranted) Judges, does however have other impacts, as will be discussed in Chapter 7.

<sup>88</sup> Karen Yeung “Quantifying regulatory penalties: Australian competition law penalties in perspective” (1999) 23(2) Melbourne University Law Review 440 at 461-462.

<sup>89</sup> Jack Bilmes and John Woodbury “Deterrence and Justice: Setting Civil Penalties in the Federal Trade Commission” (1991) 14 Research in Law and Economics 191 at 200-205.

<sup>90</sup> Karen Yeung *Securing compliance: a principled approach* (Hart Publishing, Oxford, 2004) at 65-66.

<sup>91</sup> Robert Cooter and Thomas Ulen *Law & Economics* (5th ed, Pearson/Addison Wesley, Boston, 2008) at 510.

<sup>92</sup> Kenneth Dau-Schmidt “An Economic Analysis of the Criminal Law as a Preference-Shaping Policy” (1990) 39(1) Duke Law Journal 1 at 11-13. The reasons given is that it seems to “defy common sense”, it only holds for limited cases like stealing food to survive, and it does not accord with actual sentencing practice.

modifying socially valuable activities.<sup>93</sup> Transgressors should still be made to pay a penalty, but this should be restricted to the harm caused (which includes enforcement costs).<sup>94</sup> The fact that the offender may have received a large benefit from offending, and his or her ability to pay, are irrelevant to the penalty calculation.

On the other hand, absolute deterrence takes the position that all unlawful conduct should be prevented. There is no need to consider social benefits, because it is assumed there are none (or they are always outweighed by the social costs).<sup>95</sup> The focus when setting the penalty is on the benefit to the transgressor,<sup>96</sup> rather than the harm caused or the enforcement costs incurred, although the benefit obtained is only the minimum penalty, as over-deterrence is not a problem in the way that it is in the optimal deterrence model.<sup>97</sup> In both models, the probability of detection and successful prosecution needs to be taken into account. If this is less than 100% (which it always will be), the penalty imposed needs to be increased by a commensurate amount.<sup>98</sup>

Deciding which of the two models to adopt may depend on the statement that is intended to be made – is the penalty simply a price that can be paid for inflicting harm on others (optimal deterrence), or is it a statement that the conduct is wrong regardless of the social benefits (absolute deterrence)?<sup>99</sup> – but there is little evidence that the courts apply either model when sentencing RMA offenders. In terms of optimal deterrence, there is typically no value specifically attributed to the harm caused by the offending or any reference to it driving the sentence. Instead, the comment is frequently made that harm is considered difficult to quantify, the courts instead making “an allowance for harm...on the assumption that any given offence contributes to the cumulative effect of pollution generally”.<sup>100</sup> But even if

---

<sup>93</sup> Carolyn Abbot *Enforcing Pollution Control Regulation* (Hart Publishing, Portland, 2009) at 24-26. See the various definitions of regulation set out in Chapter 2 of this thesis.

<sup>94</sup> Yeung, above n 88, at 448-449. For this reason, optimal deterrence is often called the ‘injury model’: see Bilmes and Woodbury, above n 89, at 200.

<sup>95</sup> Yeung, above n 88, at 449; Dau-Schmidt, above n 92, at 11-13.

<sup>96</sup> Absolute deterrence is often called the ‘benefit model’: see Bilmes and Woodbury, above n 89, at 205.

<sup>97</sup> Yeung, above n 90, at 65-66. The harm caused and enforcement costs will also be relevant to whether or not the regulator should take action – it should only do so if the former is more than the latter will be: Yeung, above n 88, at 449.

<sup>98</sup> Yeung, above n 88, at 449-450. For instance, if the penalty according to the harm caused or benefit obtained is \$100, but the probability of detection and successful prosecution is only 50%, the penalty should be \$200 (\$100 / 0.5).

<sup>99</sup> Oren Perez “Regulation as the art of intuitive judgment: a critique of the economic approach to environmental regulation” (2008) 4(4) *International Journal of Law in Context* 291 at 302-303.

<sup>100</sup> *Thurston v Manawatu-Wanganui Regional Council* HC Palmerston North CRI-2009-454-24, 25 & 27, 27 August 2010 at [41], citing *Plateau Farms Ltd v Waikato Regional Council* HC Rotorua CRI 2007-463-16, 17 September 2007 at [56] & [63].



harm was quantifiable, the courts would be unlikely to want to adopt it as the driver behind the sentence, as this would result in the fine essentially being a “licence fee”.<sup>101</sup> Further, an optimal deterrence approach suggests that repeat offenders should be dealt with more leniently, as there is an increased probability they will be penalised because they would be monitored more closely by the local authority, which would likely be considered objectionable.<sup>102</sup>

Absolute deterrence therefore seems more appropriate, and the higher courts have made reference to this model in RMA sentencing appeals. For instance, in *Thurston v Manawatu-Wanganui Regional Council*, Miller J stated that the “Court may prefer to focus on deterrence by eliminating the offender’s gains, which are more easily quantified, before considering whether any further penalty is warranted to reflect environmental harm”.<sup>103</sup> Similarly, in *PF Olsen Ltd v Bay of Plenty Regional Council*, Brewer J stated, under the heading “Deterrence”, that [p]enalties should be set to ensure that it is unattractive to take the risk of offending on economic grounds”.<sup>104</sup>

However, this approach does not appear to have been adopted by Environment Judges. This may be because a narrow view is sometimes taken as to what counts as the offender’s “gains”, with the High Court in *PF Olsen Ltd v Bay of Plenty Regional Council* going on to note that it is only if “there is any *profit* to be derived from the risk-taking activity...[that]... a penalty needs to be imposed to make that an unattractive course of conduct”, with there being “no need to elevate the need for deterrence” in this case because the conduct had “no direct profit motive”.<sup>105</sup> Yet even in a case where revenue had clearly been generated, and could be estimated, it did not drive the starting point, instead simply being one relevant factor.<sup>106</sup>

---

<sup>101</sup> As to which, see *R v Woolley* DC Blenheim CRI-2010-006-1979, 20 August 2013 at [8]; *Hawkes Bay Regional Council v Stockade Pastoral Farms Ltd* DC Napier CRI-2008-081-96, 20 March 2009 at [16].

<sup>102</sup> Yeung, above n 88, at 454.

<sup>103</sup> *Thurston v Manawatu-Wanganui Regional Council*, above n 100, at [46].

<sup>104</sup> *PF Olsen Ltd v Bay of Plenty Regional Council* [2012] NZHC 2392 at [62].

<sup>105</sup> At [62]-[63] (emphasis added). It may be that savings (as opposed to gains) are taken into account indirectly – for instance, in *Taranaki Regional Council v Vernon* [2018] NZDC 14037 the offending was placed in the moderately serious band of \$40,000 to \$80,000, instead of the least serious of zero to \$40,000, in part because (at [20]) it “involved a delay in rectifying an inadequate effluent system over a period of three or four years” – but this increase will typically pale in comparison to the money saved in delaying spending on the upgrade (in this case, \$250,000 (at [23])).

<sup>106</sup> *Auckland Council v Zhang* [2017] NZDC 8208 at [8]. In this case, the prosecutor’s “rough calculation” of income generated was \$49,500 (at [7]), yet the starting point adopted for the rule breaches was \$30,000 and for the breach of the abatement notice was \$5,000 (at [32]-[33]).

To understand the reason why absolute deterrence has not been adopted in practice, despite Environment Judges frequently referring to deterrence being the goal, it is necessary to consider a series of other appellate cases on RMA sentencing, starting with the High Court's decision in *Machinery Movers Ltd v Auckland Regional Council*.<sup>107</sup> As noted in Chapter 4, given the absence of any RMA-specific statutory sentencing principles a full court was convened to consider the proper approach to these cases. The Full Court went on to consider, and largely adopt, the reasoning in the Canadian first instance sentencing decision of *R v Bata Industries Ltd*.<sup>108</sup> In that case, Ormston Prov J had set out relevant factors in assessing the severity of an offence, including the nature of the environment affected, the extent of damage inflicted, the deliberateness of the offence and the attitude of the accused.<sup>109</sup> The Judge also observed that, for corporations, the Court should consider the size, wealth, nature of operations and its power, the extent of attempts to comply, remorse, profits realised and the criminal record or other evidence of good character.<sup>110</sup> Ormston Prov J then added that:<sup>111</sup>

When a court imposes a penalty in respect of an environmental offence, the level should reflect the gravity of that *particular* offence and leave room for the most serious of circumstances. The harshest sentences ought to be reserved for the worst possible factual situation.

Putting to one side for the moment the specific factors relevant to corporations, which other than profits realised go to aggravating and mitigating factors personal to the offender (and which are dealt with in the next subsection), what is apparent is that Ormston Prov J largely mandated (and the High Court adopted) an orthodox, desert-based, enquiry to sentencing. In

<sup>107</sup> *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 (HC).

<sup>108</sup> *R v Bata Industries Ltd* (1992) 9 OR (3d) 329, 7 CELR (NS) 293 (Ontario Court (Provincial Division)).

<sup>109</sup> The purposes of sentencing an environmental offender were said to be “to protect the public, to deter and rehabilitate the offenders, to promote compliance with the law, and to express public disapproval of the act”, with protection of the public being the “primary consideration” (as quoted in *Machinery Movers Ltd v Auckland Regional Council*, above n 107, at 503). The Judge had then considered that protection of the public is “best achieved by emphasising general deterrence rather than specific deterrence as the dominant sentencing principle for Bata Industries Limited”, which has both the “usual negative connotation of achieving compliance by threat of punishment ... [and] ... a more positive aspect ... [i]n its widest sense it means a sentence which by emphasizing community disapproval of an act and branding it as reprehensible has a moral or educative effect and thereby affects the attitude of the public” (as quoted at 503).

<sup>110</sup> At 503. It is not clear why these factors were said to only be relevant to corporations, but they have come to be treated as having universal application in New Zealand: see, for instance, *Thurston v Manawatu-Wanganui Regional Council*, above n 100, at [44]. Interestingly, an appeal against the sentence imposed in this case was allowed (*R v Bata Industries Ltd* 1993 CarswellOnt 264, [1993] OJ No 1679, 11 CELR (NS) 208, 14 OR (3d) 354 (Ont Ct of Justice)), and while the High Court in *Machinery Movers Ltd v Auckland Regional Council*, above n 107, stated that (at 506) “from the information available to us the Judge does not appear to have taken issue with the broad sentencing principles enunciated by Ormston Prov J”, nor could it be said that they were explicitly approved. Rather, the Ontario Court of Justice undertook (at [55]) an orthodox sentencing exercise that involved considering “the seriousness of the offences, the culpability of the corporate and individual defendants [and] the aggravating and mitigating circumstances”.

<sup>111</sup> *Machinery Movers Ltd v Auckland Regional Council*, above n 107, at 503 (emphasis in original).

particular, and as noted in Chapter 3, desert theory suggests that the sentence should be proportionate to the seriousness of the breach, with seriousness primarily made up of harm (here, the environment affected and the extent of damage inflicted) and culpability (here, the deliberateness of the offence and the attitude of the accused).<sup>112</sup> Also consistent with desert theory, no consideration is given to matters such as the costs of enforcement or the probability of detection and successful prosecution.

The primacy of a desert-based approach to setting penalties was then reinforced nearly 10 years later with the enactment of the Sentencing Act 2002, and its adoption by the higher courts in RMA cases. This is because, although the Act sets out all rationales of punishment in s 7 as available options, the principles of sentencing in s 8 suggest that when actually imposing the penalty proportionality (to seriousness) should be the overriding concern.<sup>113</sup> When the High Court considered the interface between the Sentencing Act 2002 and *Machinery Movers Ltd v Auckland Regional Council*, it noted that the sentencing principles established in the latter continue to have application, but are not comprehensive and must now be read in light of the Act.<sup>114</sup> This was confirmed by the Court of Appeal in *R v Conway*,<sup>115</sup> with the Court observing that the proper approach was to apply the two statutes “in harmony”.<sup>116</sup>

Finally, RMA sentencing was then explicitly brought within the criminal orthodoxy in *Calford Holdings Ltd v Waikato Regional Council*.<sup>117</sup> In this case, the High Court held that Environment Judges are to sentence RMA offenders in exactly the same way as for any other criminal offence.<sup>118</sup> This means setting a starting point for the offending (“the sentence considered appropriate for the particular offending (the combination of features) for an adult

---

<sup>112</sup> See generally Andreas Von Hirsch, Andrew Ashworth and Julian Roberts *Principled sentencing: readings on theory and policy* (3rd ed, Hart Publishing, Portland, 2009) at 104.

<sup>113</sup> Julian Roberts “Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002” (2003) 36(3) *Australian & New Zealand Journal of Criminology* 249 at 259.

<sup>114</sup> *Selwyn Mews Ltd v Auckland City Council* HC Auckland CRI-2003-404-159-161, 30 April 2004 at [35] and [43]; *R v Conway* [2005] NZRMA 274 (CA). It has been suggested, in the Canadian context where crimes and regulatory offences are formally differentiated (the former are dealt with federally and the latter provincially), that there should be a statement of sentencing purposes and principles specifically for the latter, organised in a hierarchical manner: see Rick Libman “Sentencing Purposes and Principles for Regulatory Offences: A New Approach for Regulatory Justice” (2011) 15(3) *Canadian Criminal Law Review* 359.

<sup>115</sup> *R v Conway*, above n 114, at [61]–[63].

<sup>116</sup> At [60].

<sup>117</sup> *Calford Holdings Ltd v Waikato Regional Council* (2009) 15 ELRNZ 212 (HC) at [31].

<sup>118</sup> At [31].

offender after a defended trial”),<sup>119</sup> making adjustments for personal aggravating or mitigating factors, and then applying a discount for a guilty plea (if any).<sup>120</sup>

However, an orthodox approach to sentencing that uses desert-based principles is likely to be restricting the starting points that are being adopted. The issue is not so much with the “harm” limb, as while (as referred to above) there are issues in quantifying this the courts are generally prepared to make “an allowance for harm...on the assumption that any given offence contributes to the cumulative effect of pollution generally”,<sup>121</sup> and the judges are well aware that it is “routine” for defendants to:<sup>122</sup>

... seek to minimise the impact of the offending on the environment by either referring to a lack of proof of actual effects on the environment or arguing that within the context of the whole environment purported to be affected, the impact is minimal. Such submissions tend to ignore or seek to minimise the definition of effect in s 3 of the RMA and its reference to potential and cumulative effects and the purpose and approach of the RMA to effects on the environment.

Rather, the problem is more when the courts come to assess culpability, the other main limb of the desert enquiry. The starting point is that *mens rea* is obviously not a necessary part of the primary offences – s 341(1) of the RMA provides that it is irrelevant to contraventions (or permitting the contravention) of ss 9, 11, 12, 13, 14, and 15 whether or not the defendant intended to commit the offence<sup>123</sup> – and therefore it is a matter of argument come sentencing.<sup>124</sup> However, because of the high percentage of guilty pleas in RMA cases, this argument is typically based on a summary of facts, rather than evidence seen and heard by the Judge.<sup>125</sup> This document then becomes a “battleground”, with defendants often accepting

<sup>119</sup> *R v Mako* [2000] 2 NZLR 170 (CA) at [34].

<sup>120</sup> *R v Clifford* [2011] NZCA 360, [2012] 1 NZLR 23 at [60]. See also *R v Taueki* [2005] 3 NZLR 372 (CA).

<sup>121</sup> *Thurston v Manawatu-Wanganui Regional Council*, above n 100, at [41], citing *Plateau Farms Ltd v Waikato Regional Council*, above n 100, at [56] & [63].

<sup>122</sup> *Bay of Plenty Regional Council v Withington* [2018] NZDC 1800 at [34].

<sup>123</sup> *Mens rea* also does not have to be proved by the prosecution in the two other most common offences, breach of an enforcement order and breach of an abatement notice, as these have been held to be traditional public welfare regulatory offences: see, respectively, *Auckland City Council v Selwyn Mews Ltd* DC Auckland CRN2004067301-19, 18 June 2003 at [93]-[100] and *Waikato Regional Council v Huntly Quarries Ltd* [2004] NZRMA 32 (DC) at [56]-[67].

<sup>124</sup> Sentencing Act 2002, s 8(a). For competing views on the appropriateness of culpability in regulatory sentencing, see Ben Vanderkolk “A sub-category of strict liability?” [2005] New Zealand Law Journal 241 and Brian Preston “Principled sentencing for environmental offences - Part 2: Sentencing considerations and options” (2007) 31 Criminal Law Journal 142 at 147.

<sup>125</sup> This rate of guilty pleas was 85% in the final prosecution study, and had ranged between 80% and 91% in the preceding three studies: see Ministry for the Environment *A study into the use of prosecutions under the Resource Management Act 1991: 1 July 2008 - 30 September 2012* (October 2013) at 7.

that an offence has been committed, but taking issue over the facts alleged by the prosecutor due to the implications this has for, among other things, culpability.<sup>126</sup>

The defendant is at something of an advantage here for two (related) reasons. The first is that one of the motivations for removing culpability from an offence is that the defendant is typically in possession of the relevant facts relating to whether or not (and how much) it is at fault, and this may not be easily ascertainable by the prosecution.<sup>127</sup> As such, the prosecution may well be on the back foot in any negotiations, or have to spend a considerable amount of time and money (for instance, on experts) obtaining evidence of this. Second, the prosecutor will be anxious to avoid a disputed facts hearing, given that it will further add to the time and cost involved.<sup>128</sup> While a defendant will also want to avoid a disputed facts hearing for the same reasons, the incentive may be less, given it is the prosecutor that bears the onus of proving beyond a reasonable doubt the existence of any disputed aggravating fact.<sup>129</sup> The end result can, therefore, be that the prosecutor tempers the summary of facts in order to get agreement, and sentencing will accordingly proceed in a more favourable light for the defendant.<sup>130</sup>

Whether for this reason or not, whatever culpability the prosecution can attribute to the defendant is likely to only be carelessness, or recklessness at worst. For instance, in the fourth and final prosecution report published by the Ministry for the Environment, 58% of cases were in the “careless” to “high level of carelessness/negligence” spectrum, with 10% having an “element of deliberateness” and 15% deliberate, and 8% accidental (and 6% no

---

<sup>126</sup> This is sometimes called “fact bargaining”: see RA Duff and others *Trial on Trial : Volume 3: Towards a Normative Theory of the Criminal Trial* (Hart Publishing, Oxford, 2007) at 171. In *Waikato Regional Council v Fulton Hogan Ltd* [2018] NZDC 2711 it was noted (at [40]) that there “is a practice that appears to be developing in relation to prosecutions under the RMA where some time is spent negotiating an agreed Summary of Facts”, although the link between this and strict liability was not drawn. The matter was further complicated in this case because there were separate, and not always consistent, summaries of facts for each of the co-defendants.

<sup>127</sup> Vanderkolk, above n 124.

<sup>128</sup> This point is developed further in Chapter 6.

<sup>129</sup> See Sentencing Act 2002, s 24(2)(c) and *United Fisheries Ltd v Ministry of Agriculture and Fisheries* HC Christchurch AP78/98, 18 June 1998 at 8-11. While the discount for a guilty plea can be affected when a disputed facts hearing is required (see *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [61]), this does not always happen.

<sup>130</sup> De Prez notes, in her research on sentencing of environmental offenders in the United Kingdom Magistrates Courts, that strict liability has allowed defendants to argue that the offending was due to either misfortune or the actions of third parties, or that, because the offence was not intentional, enforcement was an “unreasonable restriction on the right to trade”: Paula de Prez “Excuses, Excuses: The Ritual Trivialisation of Environmental Prosecutions” (2000) 12(1) *Journal of Environmental Law* 65. Caution must be taken in applying these arguments (especially the third) to New Zealand circumstances, where Environment Judges are attuned to the causes of environmental offending, but the possibility for minimisation by the defendant remains.

finding).<sup>131</sup> Similarly, in the 2016/2017 sentencing cases reviewed, most cases were assessed by the Judge as being in this careless to reckless spectrum, with a small number either side (that is, being largely accidental but caught by liability without fault or, at the other end of the spectrum, intentional). This means that the effective maximum penalty is typically reduced, as space is left at the top for the “most serious of cases for which that penalty is prescribed”.<sup>132</sup>

More generally, the issue with a desert-based approach to RMA sentencing is that, once the assessment is made as to the gravity of the offending, the starting point adopted needs to (broadly) fit in with that adopted in similar cases,<sup>133</sup> and historically even serious environmental breaches have attracted relatively low sentences.<sup>134</sup> As such, while starting points can increase – and have done so – this only happens incrementally, as individual cases that attract inconsistently high starting points are liable to be overturned on appeal if the end result is “manifestly excessive”. While it appeared that the introduction of the RMA and the \$25,000 fine upheld in *Machinery Movers Ltd v Auckland Regional Council* might signal an immediate and significant increase in penalties across-the-board, this result is best seen as an outlier, given the average total fine per case during the first ten years of the RMA (when the decision was issued) was only \$6,500.<sup>135</sup> Ultimately, therefore, the desert-based approach has meant that it has taken a long time for starting points even to reach where they are now.

## 2 Many discounts, and few uplifts, to reach the end point

The problem of restricted starting points is then compounded by Environment Judges considering themselves required, based on the provisions of the Sentencing Act 2002, to give a number of discounts for mitigating factors personal to the offender, but rarely considering themselves able to provide an uplift for aggravating factors. Beginning with the latter, the predominant factor that can lead to an increase in the starting point is relevant previous

<sup>131</sup> Ministry for the Environment, above n 125, at 18.

<sup>132</sup> Sentencing Act 2002, s 8(c) and (d). For an extreme example, see *Maritime New Zealand v Daina Shipping Company*, above n 84. Despite this case being (at [2]) “New Zealand’s worst maritime environmental disaster” and involving (at Endnote ii) “hundreds of tonnes of oil” and “hundreds of containers and their contents, including dangerous goods” being discharged into the ocean, and the total cost to the Crown (as at October 2012) being approximately \$47 million, a starting point of \$450,000 was adopted because the Judge considered he had (at [9]) “to leave room for those cases where there has been deliberateness, recklessness, and/or a high level of carelessness by the person being sentenced.”

<sup>133</sup> See, for instance, s 8(e) of the Sentencing Act 2002.

<sup>134</sup> Resource Management Law Reform Core Group, above n 15, at 47. See also Penny Crofts “Communicating the culpability of illegal dumping: *Bankstown v Hanna* (2014)” (2015) 2(1) *Australian Journal of Environmental Law* 57 at 69.

<sup>135</sup> Ministry for the Environment *A study into the use of prosecutions under the Resource Management Act 1991: 1 October 1991 - 30 June 2001* (May 2002) at 8.

convictions,<sup>136</sup> but given prosecution is used sparingly most offenders will only have council warnings or infringement or abatement notices as part of their history.<sup>137</sup> Indeed, with the advent of the formal diversion schemes that are offered by some local authorities this will only increase.<sup>138</sup> This is because it has been held that a defendant that has previously gone through such a process and offended again will not receive an uplift to the starting point, as they will not have received a conviction upon completing the diversionary scheme.<sup>139</sup>

On the other hand, the courts generally recognise a number of discounts from the starting point adopted. These include for previous good character,<sup>140</sup> remorse shown by the offender,<sup>141</sup> remediation/restoration efforts and upgrades to infrastructure to prevent the offending happening again (although not on a “dollar-for-dollar” basis).<sup>142</sup> Most importantly, though, the defendant will receive a discount of up to 25% for entering a guilty plea.<sup>143</sup> The effect of these discounts (and lack of uplifts) can best be seen in the 39 cases reviewed in the 2016/2017 financial year, whereby aggregated starting points of \$2,079,500 were reduced by just over a third to aggregated fines of \$1,378,198.<sup>144</sup>

Finally, s 40(1) of the Sentencing Act 2002 provides that, in determining the amount of a fine, the Court must take into account the financial capacity of the offender. In a limited number of cases, the courts have relied on s 40(1) to increase the fines, but it would seem that they are only prepared to do so when the defendant is a very large corporation.<sup>145</sup> Instead,

---

<sup>136</sup> Sentencing Act 2002, s 9(1)(j). Indeed, sometimes a previous conviction will not even result in an uplift, but rather simply negate any discount for past good character that may have been given: see *Manawatu-Whanganui Regional Council v PGG Wrightson Ltd* [2019] NZDC 7331 at [32].

<sup>137</sup> It could be argued that previous warnings justify an uplift, but this is questionable given they are not issued following an adjudicative process (like a conviction) and the parties will generally be unwilling to have a disputed facts hearing over such a satellite issue.

<sup>138</sup> See, for example, Environment Canterbury *Guidelines for implementing Alternative Environmental Justice* (2012). Such schemes are discussed in more detail in Chapter 6.

<sup>139</sup> *West Coast Regional Council v Johnson Brothers Transport (2006) Ltd* [2018] NZDC 22057 at [19]-[21].

<sup>140</sup> Sentencing Act 2002, s 9(2)(g). This is the case even if the offending was deliberate: see *Manawatu-Whanganui Regional Council v Williamson* [2019] NZDC 8877 at [23] and [28].

<sup>141</sup> Sentencing Act 2002, s 9(2)(f) and *Hessell v R*, above n 129, at [64].

<sup>142</sup> As to the latter, see *Canterbury Regional Council v A & H Dairies Ltd* [2017] NZDC 1414 at [35] and [37]; as to the former, see *Manawatu-Wanganui Regional Council v Ruapehu Alpine Lifts Ltd* (2014) 18 ELRNZ 68 (DC) at 74 and, more recently, *Saxton v Waikato Regional Council* [2018] NZHC 3217 at [20]-[22].

<sup>143</sup> Sentencing Act 2002, s 9(2)(b) and *Hessell v R*, above n 129.

<sup>144</sup> It can be noted that in the case of *Bay of Plenty Regional Council v Waiotahi Contractors Ltd* [2018] NZDC 19938 the sentencing Judge observed (at [50]) that, in light of the decision of the High Court in *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881, the Court may have to review the “substantial adjustments to the starting points” that have been made in past RMA sentencing cases.

<sup>145</sup> For example, *Bay of Plenty Regional Council v Fonterra Limited* DC Tauranga CRI-2015-087-385, 27 July 2015 (50% uplift to starting point, mainly for the size and wealth of the defendant but also for previous offending); *Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd*, above n 45 (uplift of one-third to the starting point due to the size and wealth of the defendant). The parent company of Fonterra Limited (Fonterra Co-operative Limited) had a net profit after tax of \$506m in the year that ended four days after Fonterra Limited

this more typically has the effect of decreasing the amount payable.<sup>146</sup> Such reductions can be substantial, as the Court is generally unwilling to impose a penalty that will put the offender out of business.<sup>147</sup>

It is here, however, that the courts appear to have taken a step to limit this effect of s 40(1), by accepting that defendants can insure against RMA fines. For many years this had been allowed, seemingly unquestioned,<sup>148</sup> and on occasion defendants had even been given discounts to reflect that they “responsibly obtained insurance in respect of the payment of the fine”.<sup>149</sup> However, the ability to insure against fines was argued in the 2018 case of *Bay of Plenty Regional Council v Whitiakau Holdings Ltd*,<sup>150</sup> on the basis that it would seem to contradict the maxim *ex turpi oritur causa non oritur actio* – “an action does not arise from a base cause”.<sup>151</sup> The issue for the Court was an unenviable one – either prohibit insurance against fines and be left to reduce heavily the end point for impecunious (corporate) defendants, or allow insurance against fines, which means the defendant will only need to pay the insurance excess.<sup>152</sup> Ultimately, the Court opted for the latter, on the basis that the sentencing Judge did not believe, in the absence of an express statutory provision,<sup>153</sup> she had the ability to declare the insurance policy void.<sup>154</sup> This meant that even where the defendant is impecunious the deterrent effect of the sentence will be preserved, although it will be suggested, in the next subsection, that this decision can be explained in another way.

---

was sentenced. The wealth of Mobil Oil New Zealand Ltd, and its parent company, has already been noted in this section.

<sup>146</sup> For an extreme example, see *Tasman District Council v Hunter Laminates 2014 Ltd (in liq)* [2018] NZDC 17605, where the fine was reduced to \$0 because the company was in liquidation by the time of sentencing.

<sup>147</sup> *Machinery Movers Ltd v Auckland Regional Council*, above n 107, at 509. For a recent discussion, see *Worksafe New Zealand v Rangiora Carpets Ltd* [2017] NZDC 22587 at [48]-[52].

<sup>148</sup> But see Chris Jurgeleit “Insurance Against Liability to Pay Statutory Fines and Penalties” (1996) 26 Victoria University of Wellington Law Review 735.

<sup>149</sup> See, for example, *Canterbury Regional Council v Canterbury Greenwaste Processors Ltd* DC Christchurch CRI-2012-009-9818-9820, 24 April 2013 at [105].

<sup>150</sup> See *Bay of Plenty Regional Council v Whitiakau Holdings Ltd* [2018] NZDC 3850.

<sup>151</sup> See *Burrows v Rhodes* [1899] 1 QB 816.

<sup>152</sup> It was suggested that one way around this problem would be to allow insurance and impose not only the (full) fine, but also community work on any individuals convicted, but this course was not followed in *Waikato Regional Council v Okawa Ltd* [2018] NZDC 7725 at [76] and *Waikato Regional Council v Smith* [2018] NZDC 6760 at [73], as *Bay of Plenty Regional Council v Whitiakau Holdings Ltd*, above n 150, had only recently been decided. However, this depends on an individual being convicted, and as will be seen in Chapter 6 charges against individuals (especially directors) are frequently withdrawn as part of a plea arrangement, and, in any event, it is not clear whether such an approach would be upheld on appeal as the sentence imposed would then be inconsistent with that imposed in similar circumstances (which will typically be a fine only).

<sup>153</sup> Such as is contained in the Health and Safety at Work Act 2015, s 29.

<sup>154</sup> *Bay of Plenty Regional Council v Whitiakau Holdings Ltd*, above n 150, at [151]-[240].



### *B Local Authorities Prefer Reparative Outcomes*

If deterrence is the goal and the courts are, as argued above, constrained from imposing sterner fines (other than on a slowly incremental basis), the next point to consider is why the courts are not imposing other, potentially more deterrent, *types* of sentence. As noted in the previous chapter, non-monetary sentences for natural persons are imposed relatively infrequently, and “punitive” enforcement orders and resource consent reviews appear to be rare and non-existent (respectively). While it could be argued that for natural persons there is a presumption in favour of a fine in the Sentencing Act 2002, there is much scope for courts to move beyond this, such as if it would not achieve a purpose (or purposes) of sentencing (which obviously includes deterrence), the application of any of the sentencing principles would make it inappropriate, or it would be “clearly inadequate in the circumstances”.<sup>155</sup> In terms of non-natural persons it is, of course, the case that the traditional non-monetary sentences are not available, but this does not explain the lack of consideration for a “punitive” enforcement order<sup>156</sup> or a resource consent review.<sup>157</sup> Put shortly, a more restrictive sentence than a fine on an individual, or an order requiring a company to temporarily or permanently cease operating, would seem to be a far greater deterrent than a monetary penalty, yet this is rarely asked for or ordered.

It is suggested in this subsection that this is because local authorities have little interest in the courts imposing these penalties because they provide no reparative outcome, and the courts typically follow the wishes of the local authority in terms of the type of penalty (but not necessarily the quantum). It is then argued that this focus on reparative outcomes also explains why local authorities do not “use” convictions, or leverage prosecutions to create informal penalties, to increase the severity of these sanctions.

### *1 Fines provide compensation, other primary penalties are just punishment*

The main sentences that a court can impose for RMA offending are a fine, non-monetary sentences for natural persons (community work, supervision, intensive supervision, community detention, home detention and imprisonment), “compliance-focussed” enforcement orders, “punitive” enforcement orders and resource consent reviews. However, despite it being theoretically possible to impose a number of these together, as shown in

---

<sup>155</sup> Sentencing Act 2002, s 13(a), (b) and (d).

<sup>156</sup> Such as was made in *Bay of Plenty Regional Council v Hood* [2017] NZDC 25156 and encouraged in *Machinery Movers Ltd v Auckland Regional Council*, above n 107.

<sup>157</sup> This can result in the cancellation of the consent, pursuant to ss 339(5)(b), 128(2) and 132(4), if there are “significant adverse effects on the environment resulting from the exercise of the consent”.

Chapter 4 the vast majority of cases are resolved by way of a fine with, in some instances, a “compliance-focussed” enforcement order. It is suggested that this is driven by local authorities, on the basis that fines and “compliance-focussed” enforcement orders are “reparative” (and the formal sentence of reparation is generally not available), whereas the other sentences are not.<sup>158</sup>

On the face of it, referring to a fine as a “reparative” sentence seems misplaced. However, from the perspective of the local authority this is exactly its effect, given s 342 of the RMA. This provision, which operates automatically,<sup>159</sup> requires that at least 90%, but usually no more,<sup>160</sup> of the fine imposed be paid to the local authority that commenced the proceeding. In essence, therefore, the local authority is being compensated for some or all (or even more than) the cost it has incurred in investigating and prosecuting the matter.

This compensation is considered important by local authorities for two reasons. First, as noted in the previous section, prosecution is expensive, with even the simplest case likely to be in the tens of thousands of dollars. Complex cases, or ones where the defendant pursues an aggressive defence, will cost much more. Second, local authorities will, typically, otherwise only get a minimal amount, if any, of their costs paid. This is because costs awards are governed by the Costs in Criminal Cases Act 1967 and the Costs in Criminal Cases Regulations 1987, and these provide a scale rate of only \$113 per half day for an undefended matter (typically a guilty plea) and \$226 per half day for a defended case.<sup>161</sup> The Court may make an order for the payment of costs in excess of that scale if “having regard to the special difficulty, complexity, or importance of the case, the payment of greater costs is desirable”,<sup>162</sup>

---

<sup>158</sup> In terms of the absence of reparation as an order, in *Bay of Plenty Regional Council v Whitikau Holdings Ltd*, above n 150, it was noted (at [236]) that for “virtually all RMA offending, the fact that reparation and enforcement orders are available is a theoretical, but not practical, reality”. This is reflected in the fact that, in the sentencing decisions analysed from the 2016/2017 financial year, reparation was ordered on only one occasion (see *Northland Regional Council v Woodbank Trading Ltd* [2016] NZDC 21397).

<sup>159</sup> Section 342(1) provides that “the court *shall*...order that the fine be paid” (emphasis added).

<sup>160</sup> There are a limited number of cases, such as *Augustowicz v Machinery Movers Ltd* (1992) 2 NZRMA 209 (DC) and *Hawkes Bay Regional Council v Bartlett* DC Napier CRN0041008890, 16 October 2000, where the Court has purported to use s 341(3), which provides that “where any money awarded by a court in respect of any loss or damage is recovered as a fine, and that fine is ordered to be paid to a local authority under subsection (1), no deduction shall be made under subsection (2) in respect of that money”, but it is questionable whether the uses in these cases was appropriate.

<sup>161</sup> Costs in Criminal Cases Regulations 1987, Schedule 1.

<sup>162</sup> Costs in Criminal Cases Act 1967, s 13(3).

but this test is not met simply because the scale is “perceived to be inadequate”.<sup>163</sup> In the usual course, therefore, it is only scale costs (if anything) that are awarded.<sup>164</sup>

There are also, it is suggested, two reasons why “compliance-focussed” enforcement orders are sometimes sought in addition to a fine. One is that they are a reparative sentence, in that the defendant is being made to address the effects of the offending or its cause (or both). The second is that they will not typically impact on the size of the fine.<sup>165</sup> For instance, in *R v Fan* the sentencing Judge noted:<sup>166</sup>

[34] In this case I do not consider that an enforcement order is part of the penalty in the sense that it would simply be returning the situation to that which was lawfully permitted. For that reason I do not see the imposition of the enforcement order as a basis for reducing the fine.

On the other hand, there is no reparative aspect in non-monetary sentences for individuals, and therefore such sentences are not favoured by local authorities unless the defendant can prove he or she is impecunious. For instance, in *Bay of Plenty Regional Council v Singh* the defendant pleaded guilty to five RMA charges and, when the matter was first called for sentencing, submitted that he could not pay a fine and so community work should be imposed.<sup>167</sup> Despite community work being a more restrictive sentence than a fine, this was “strongly opposed” by the prosecutor,<sup>168</sup> on the basis that the local authority believed the defendant had access to funds from a trust that could be used to pay a fine, and the matter was adjourned for investigations to take place.<sup>169</sup> Indeed, this preference for a fine, if the

<sup>163</sup> *Roberts v Northland Regional Council* [2014] NZHC 284 at [109], applying *Solicitor-General v Moore* [2000] 1 NZLR 533 (CA) at [29].

<sup>164</sup> The fourth and final prosecution report records that, in the majority of prosecutions in the four periods studied, the courts have awarded scale costs (Ministry for the Environment, above n 125, at 19). The position does not seem to have changed since then, and even scale costs are not awarded very often – in the sentencing decisions analysed from the 2016/2017 financial year, costs were awarded in 27 of the 59 cases, and always at scale.

<sup>165</sup> Indeed, there appears to be a practice developing whereby the payment of costs is included in “compliance-focussed” enforcement orders: see, for example, *Southland Regional Council v Baird* [2018] NZDC 11941. However, there is no information given in cases such as this as to what these costs relate to, and therefore it is questionable how they fit within the decision of the High Court in *Interclean Industrial Services Ltd v Auckland Regional Council* [2000] 3 NZLR 489 (HC) that s 314(1)(d) of the RMA is not to be used to recover prosecution costs. See also *Auckland Council v Fitzgerald* [2016] NZDC 13692, where the defendant was discharged without conviction and subject to (among other things) an enforcement order that included the payment of \$9,000 “on account of costs of this order and prosecution”.

<sup>166</sup> *R v Fan* [2016] NZDC 7194.

<sup>167</sup> *Bay of Plenty Regional Council v Singh* [2018] NZDC 13866.

<sup>168</sup> At [75].

<sup>169</sup> Matt Shand “\$1700 an hour community work suggested by Tauranga polluter for serious breaches” *Stuff* (online ed, Wellington, 13 March 2018). When the matter was recalled it was determined that the defendant could not use the trust’s funds, but that he “might have access to \$40,000 with which to pay a fine” (*Bay of Plenty Regional Council v Singh*, above n 167, at [74]). The sentence imposed was, instead of a fine of \$142,500, a fine of \$40,000 and 400 hours of community work (at [70] and [83]).

defendant can pay one, appears to hold even where the offending is serious and he or she has multiple previous convictions for RMA offending.<sup>170</sup>

In terms of “punitive” enforcement orders and resource consent reviews, these are generally not sought by councils for two reasons. First, in the usual course, local authorities do not want people who are in breach of permitted activity rules or who breach their resource consent to stop operating; rather, they just want them to do so in accordance with the rules or the conditions of the consent (as the case may be). Second, as a penalty, this will often replace, or at least reduce, the fine. Indeed, this is precisely what happened in *Bay of Plenty Regional Council v Hood*, with the order requiring the defendant to cease farming pigs, remove all pigs and not keep any further pigs on the property, and to undertake remedial works, being imposed instead of a fine of \$26,250.<sup>171</sup>

It is important to be clear that the argument is not that local authorities are disinterested in deterrence, but that they want this to be achieved as a by-product of a reparative sentence. Put shortly, deterrence is not in practice the primary goal. This can be seen in the related proceedings of *Northland Regional Council v Beejay Stud Ltd*<sup>172</sup> and *Northland Regional Council v Clear Ridge Station Ltd*,<sup>173</sup> and their aftermath. In these cases, fines of \$135,000 and \$90,000 (respectively) were imposed on two related companies, but these were still outstanding over a year later and the latest report was that they were unlikely to ever be paid, as the farms owned by the companies had been sold and it transpired that neither had any remaining assets.<sup>174</sup> When questioned about this, a representative from the Council said it “had proceeded with the prosecution on the basis that the fines would be paid in full” and that:<sup>175</sup>

The council takes prosecutions as a last resort and expected them to set a general deterrent to other farmers and a specific deterrent to the two companies. It is disappointing that in this case, not only is there no specific deterrent, the ratepayers of Northland are out of pocket for over \$50,000 in costs for the prosecutions.

---

<sup>170</sup> See, for example, *Waikato Regional Council v Pollock Farms (2011) Ltd* [2019] NZDC 2204, where the subject of non-monetary sentences appears to have never been raised despite the defendant director being highly culpable and having two previous RMA convictions.

<sup>171</sup> *Bay of Plenty Regional Council v Hood*, above n 156.

<sup>172</sup> *Northland Regional Council v Beejay Stud Ltd*, above n 60.

<sup>173</sup> *Northland Regional Council v Clear Ridge Station Ltd*, above n 60.

<sup>174</sup> Marty Sharpe “Councils issue nearly twice as many pollution notices - and worst dairy farms are still to pay fines” *Sunday Star-Times* (online ed, Wellington, 17 September 2017).

<sup>175</sup> Marty Sharpe “Fine of \$225,000 for dirty dairying will go unpaid because companies are broke” *Stuff* (online ed, Wellington, 15 May 2018).

However, there was (in addition to the general deterrent value of the fine) a specific deterrent to the companies, in that they are no longer operating. What the representative means, of course, is that there was no specific deterrent to the owners of the companies, but the fault for this must lie with the Council as it withdrew the charges against the (same) director,<sup>176</sup> presumably as part of a plea arrangement with the companies.<sup>177</sup> But it seems, from the final comment, that the issue was as much that the Council would not receive any compensation for the cost of prosecuting the companies in achieving this deterrence.

The approach taken by local authorities is in one sense understandable. If a council has spent tens of thousands of dollars (if not more) prosecuting and it has the choice between receiving some of this back (from a fine) or not receiving any of it but the offender being punished (for example, by being sentenced to a term of community work), then the first option may seem more logical. However, as will be discussed in Chapter 6, the pursuit of reparative outcomes can lead to problems.

Before moving on to the approach local authorities take to convictions and informal penalties, there is another matter to address. It has been argued that local authorities prefer reparative penalties, but sentences are obviously imposed by the courts and therefore it is necessary to consider the approach they take. The first point to note is that, despite non-monetary sentences for natural persons, “punitive” enforcement orders and orders for a resource consent review being made by the courts, from a practical perspective they depend for their imposition on local authorities. In terms of sentencing individuals to non-monetary outcomes, while Judges are able to impose such sentences if they consider the provisions of the Sentencing Act 2002 are met, they are highly unlikely to do so if this has not been requested by the prosecution.<sup>178</sup> Similarly, the making of a “punitive” enforcement order or an order for a resource consent review realistically depends on the local authority arguing for this, as it is going to involve ongoing action on the part of the council (for instance, to draft the enforcement order or to conduct the resource consent review), so the Court is not going to force this on an unwilling local authority.

---

<sup>176</sup> *Northland Regional Council v Beejay Stud Ltd*, above n 60, at [1]; *Northland Regional Council v Clear Ridge Station Ltd*, above n 60, at [1].

<sup>177</sup> The problems with such plea arrangements are discussed in Chapter 6.

<sup>178</sup> Ironically, as cases like *Bay of Plenty Regional Council v Singh*, above n 167, show, it is not uncommon for a defendant to request a non-monetary sentence instead of a fine.

But in any event, it is apparent that the courts agree with local authorities' preference for reparative penalties.<sup>179</sup> The starting point is the comment that is frequently made by judges in RMA sentencing cases that fines will “most often” be the appropriate sentence.<sup>180</sup> However, there is generally a lack of explicit explanation as to why this is the case.<sup>181</sup> The most obvious reason why the courts would, all other things being equal, consider a fine to be the appropriate sentence is that this would be in accordance with the “polluter pays” principle, in that the offender is, literally, being made to pay for the environmental harm he or she has caused. But as was seen in the previous subsection, it is rare that a starting point is driven by the environmental harm that has been caused and, even if it was, this would likely be reduced by the discounts a defendant is typically entitled to. Further, offenders can be made to pay for the environmental harms they have caused by “compliance-focussed” enforcement orders (and, in some circumstances, reparation).

As such, it would seem that the courts consider fines to “most often” be the appropriate sentence because of the compensation they provide to the local authority. For instance, in *R v Fan* Judge Harland stated, in declining a request by the defendant that the fine of \$30,000 should be substituted for community work, that “the ratepayers should not have to pay Council costs, rather the costs should be to the person who caused the costs to be incurred in the first place.”<sup>182</sup> Similarly, in *R v Yealands*, the sentencing Judge noted, after assessing reparation of \$12,983.25, that while “[o]rdinarily” a conviction and discharge would have been the appropriate sentence to go with this, it would mean that the local authority would not receive a contribution towards its costs, and accordingly a fine of \$5,000 was also imposed.<sup>183</sup> The position was summed up in *Bay of Plenty Regional Council v Merrie*, where the Court stated:<sup>184</sup>

...The prosecutor has a statutory duty under s 84 of the RMA to enforce the observance of its plan. In this case it issued abatement notices to the defendants to do so. Had those been complied with, then no charges would have been laid and no court

---

<sup>179</sup> Such an approach may not be uncommon – White has argued that the New South Wales Land and Environment Court focuses on “reparative justice” when sentencing: Rob White “Reparative justice, environmental crime and penalties for the powerful” (2017) 67(2) *Crime, Law and Social Change* 117.

<sup>180</sup> *Selwyn Mews Ltd v Auckland City Council*, above n 114, at [40]. See also *Canterbury Regional Council v PGG Wrightson Ltd* DC Christchurch CRI-2012-009-11971, 28 March 2013 at [6].

<sup>181</sup> For instance, in *Selwyn Mews Ltd v Auckland City Council*, above n 114, Randerson J simply stated (at [40]) “[i]n environmental cases, fines will most often be the appropriate penalty.”

<sup>182</sup> *R v Fan*, above n 166, at [30].

<sup>183</sup> *R v Yealands* [2018] NZDC 4115 at [102].

<sup>184</sup> *Bay of Plenty Regional Council v Merrie* [2018] NZDC 1621 at [72]. See also *Matamata-Piako District Council v Fraser-Jones* DC Hamilton CRN 12039500198-200, 26 August 2013 at [83]; *Waikato Regional Council v Fulton Hogan Ltd*, above n 126, at [126].

costs incurred or sought to be recovered. The fact that each defendant contravened the abatement notices served on them and these charges followed has led to the prosecutor incurring legal costs which it seeks to recover through the fines it submits ought to be imposed on the defendants. That outcome must be within the purpose of s 342 of the RMA, which requires 90% of fines to be paid to the local authority instituting a prosecution. ...

However, as will be shown in Chapter 6, the corresponding point made by the sentencing Judge in *Bay of Plenty Regional Council v Merrie*, that the costs actually incurred by the prosecutor are not to be taken into account in determining the level of fine,<sup>185</sup> places major hurdles in the way of the local authorities' goal of reparative outcomes and can, at times, drive inappropriate behaviour.

That fines are the only practical way for local authorities to recover their costs also provides an explanation why applications for a discharge without conviction are not normally granted by Environment Judges.<sup>186</sup> If a discharge without conviction is granted it means that there will not be any fine imposed, and therefore the local authority will not be compensated in this way. Where the Court does accept a defendant's application for a discharge without conviction, it is usually because one of the conditions of such a discharge is that the defendant will pay a large proportion, or all, of the council's costs,<sup>187</sup> or co-defendants are being fined and so the local authority will still be recovering a portion of its costs via s 342 of the Act.<sup>188</sup>

Finally, reference was made at the end of the previous section to insurance against fines, and the comment was made that a refusal to prohibit this preserved the general deterrent effect of such sentences where the defendant was impecunious. However, the fact that fines provide a reparative outcome for local authorities is another way of explaining this refusal. Without insurance, the fines to be imposed on those who have limited means would need to be reduced, and therefore the council will not get compensated (or be compensated less) for the

---

<sup>185</sup> *Bay of Plenty Regional Council v Merrie*, above n 184, at [77].

<sup>186</sup> *Bay of Plenty Regional Council v Withington*, above n 122, at [44].

<sup>187</sup> See, for example, *Waikato Regional Council v Fulton Hogan Ltd*, above n 126. In this case, the sentencing Judge explicitly stated (at [127]) that she would only be prepared to discharge Fulton Hogan Limited without conviction if it met its share of the costs of prosecution. A discharge without conviction was subsequently granted after Fulton Hogan Ltd agreed to pay Waikato Regional Council \$15,000 as a contribution towards its prosecution costs (which amounted to \$59,639.53), an increase on the \$8,100 it had previously offered (and which had apparently been accepted by the Council): see *Waikato Regional Council v Fulton Hogan Ltd* [2018] NZDC 6759.

<sup>188</sup> See, for example, *Otago Regional Council v Clark* [2016] NZDC 21626; *Tauranga City Council v Jacko Basil Holdings Ltd* [2017] NZDC 3273; *Otago Regional Council v Liquid Calcium Ltd* [2017] NZDC 11458; and *Waikato Regional Council v Cazjal Farm Ltd* [2017] NZDC 12226.

costs it has incurred in bringing the prosecution.<sup>189</sup> Having said that, in these circumstances local authorities need to be careful as to how they pitch their case, as insurance policies typically exclude cover where it was a “deliberate or reckless breach of, or disregard for” the provisions of the Act.<sup>190</sup> The irony is that, usually by attributing a greater level of culpability to the defendant this (all other things being equal) increases the size of fine (and so the recovery to the council), but if this level of culpability goes above a certain threshold, and the insurer declines cover, then the local authority will receive nothing if the defendant company has gone, or goes, out of business.<sup>191</sup>

## *2 Only cost comes from using convictions and leveraging prosecutions*

Finally, the focus by local authorities on reparative outcomes can also explain why, as noted in the previous chapter, the formal consequences of a conviction appear low and informal penalties are variable. In particular, councils do not always “use” convictions against regulatees when considering future resource consent applications because there is little to be gained by the council in stopping someone from operating in the future, but there is a “cost” in that this will be one less business contributing to the local economy.<sup>192</sup> In a similar vein, local authorities do not appear to leverage prosecutions (as much as they could) to create informal penalties, for instance by routinely publishing the names of convicted defendants on their websites. This is because there is no reparative benefit to the council from doing so, but it may impact on the council’s ability to work co-operatively with the regulatee in the future and any image the local authority has cultivated of being “business friendly”.<sup>193</sup>

These points should not be pushed too far, as some councils will assess resource consent applications more closely when dealing with a known offender, and others regularly issue press releases outlining their latest successful prosecution. However, there is no co-ordinated and consistent nationwide approach. It would seem that, across-the-board, the fine is what is

---

<sup>189</sup> Indeed, the sentencing Judge essentially said as much in *Waikato Regional Council v Okawa Ltd*, above n 152, at [76] and *Waikato Regional Council v Smith*, above n 152, at [73].

<sup>190</sup> See, for example, AMI Insurance Farm Insurance Policy Wording at 24.

<sup>191</sup> As was the case in *Tasman District Council v Hunter Laminates 2014 Ltd (in liq)*, above n 146.

<sup>192</sup> This in, in some senses, like what Sanders and Young have noted (Andrew Sanders and Richard Young *Criminal justice* (3rd ed, Oxford University Press, Oxford, 2007) at 369):

... corporations act according to capitalist laws of economic behaviour rather than laws of due process or social justice. If forced to comply with laws which make processes uneconomic (or, more realistically, less profitable) firms will simply scale down or move their business. Regulatory agencies which genuinely care about their true clients (the workers within the industry they regulate) are thus forced into choosing between two unpalatable alternatives: corporate law breaking or reduced economic activity.

See also Richard Young and Andrew Sanders “The Ethics of Prosecution Lawyers” (2004) 7(2) *Legal Ethics* 190 at 198.

<sup>193</sup> As some councils describe themselves: see Brown, above n 19, at 36.



most important and any secondary penalties are very much dependent on the case at hand and the prosecuting council.

#### *IV Conclusion*

This chapter was about explaining why the RMA's offences are ineffective. It was first argued that there are two reasons why there is a low certainty that a criminal penalty will be imposed. One is that local authorities allocate limited resources to compliance, monitoring and enforcement and have adopted compliance approaches to detected breaches. The other is that the public is unable, in practice, to either pressure councils to prosecute more or bring proceedings themselves. It was then argued that the penalties are of no more than moderate severity because, when a prosecution is successfully brought, local authorities ensure that fines are the primary penalty imposed, due to the compensation these provide, but the courts are unable to increase these fines beyond a modest level.

Accordingly, it can be seen that the ineffectiveness of the offences stems from constraints on both the courts and the public that stop them from pursuing deterrence, and choices made by councils to not in fact pursue deterrence. In terms of the latter, the choices local authorities make are, in essence, to use prosecution sparingly and, when they do prosecute, seek reparative outcomes. In terms of the constraints, some of these arise from the use of the criminal process, with the time and cost of prosecuting stopping the public from taking action and sentencing orthodoxy restricting the size of fine the courts can impose. However, other constraints are caused by the choices made by the local authorities, such as the reluctance by councils to notify the public of breaches of the Act and their unwillingness to apply for "punitive" enforcement orders or resource consent reviews. In short, therefore, in addition to local authorities not pursuing deterrence, they are also stopping the courts and the public from doing so.

Indeed, the approach taken by councils to prosecutions appears distinctly "non-criminal". The Solicitor-General's Prosecution Guidelines, which local authorities are instructed to apply,<sup>194</sup> and they repeatedly say they do apply them,<sup>195</sup> contain a presumption of prosecution where there has been a contravention of the criminal law, and this "provides the starting point for consideration of each individual case".<sup>196</sup> However, when it comes to RMA breaches the

---

<sup>194</sup> Ministry for the Environment, above n 11, at 70.

<sup>195</sup> See, for instance, Taranaki Regional Council, above n 34, at 47.

<sup>196</sup> Crown Law Office, above n 47, at 5.7.

presumption has, essentially, been reversed – local authorities will not prosecute unless they have no other option. Similarly, while seeking reparative outcomes appears to be in line with reparation being a purpose of sentencing listed in the Sentencing Act 2002,<sup>197</sup> such a purpose is in fact focussed on victims of offending, not forcing the offender to repair damage to their own property (or fix the issue that caused the non-compliance) or compensating the prosecutor for the costs of bringing charges. Yet it is these latter outcomes that are given the highest priority by local authorities.

Is prosecuting sparingly and seeking reparative outcomes nevertheless an appropriate way, from a criminal law perspective, of using the offences? This is the second limb of the research question and the topic of the next chapter.

---

<sup>197</sup> Section 7(1)(d).

## Chapter 6 – Are the Offences Being Used Appropriately?

---

### *I Introduction*

As noted at the end of the previous chapter, local authorities prosecute sparingly and, when they do prosecute, they seek reparative outcomes. Such an approach, which can be termed (for ease of reference) the “reparative gloss”, implies that local authorities will prioritise two things when prosecuting or deciding whether to prosecute. The first is that any damage caused by the defendant be remedied (or the issue that led to the non-compliance be fixed) and the second is that the council recovers as much of its costs incurred as it can. The first of these things can, generally, be achieved by way of a “compliance-focussed” enforcement order on sentencing, but the second is more problematic. As also noted in the previous chapter, although the courts seem to agree that fines should usually be the *type* of sentence imposed, the *quantum* of the fine they impose cannot, as a matter of law, be related to the costs incurred by a local authority.<sup>1</sup> This means that when making prosecution decisions local authorities will want to keep costs as low as they can and have the offender pay as much of these costs as possible (either by maximising fines, given s 342 of the RMA, or directly to the council).

Is this way of using the offences appropriate? This is the second limb of the research question and the topic of this chapter. The question is answered by considering three prosecution decisions that local authorities must make – what types of cases to pursue (section II), how to resolve cases in court (section III) and how to resolve cases out of court (section IV). For each of these decisions, the outcomes the reparative gloss has led to, the problems with the way that local authorities are acting to achieve these outcomes, and how local authorities have been able to act in this way are considered. The overall argument advanced is that the manner in which local authorities are using the offences is, from a criminal law perspective, inappropriate, and more akin to civil proceedings than prosecutions, but they have been allowed to act in this way due to a lack of checks on their actions.

---

<sup>1</sup> *Bay of Plenty Regional Council v Merrie* [2018] NZDC 1621 at [77]. Indeed, as discussed later, the size of the fine is not even indirectly related to the costs incurred – it may cost far more to prosecute a less serious breach, but which is strongly defended, than a more serious breach that the defendant pleads guilty to at the first available opportunity.

## *II Choosing What Types of Cases to Prosecute – No Harm No Foul*

The reparative gloss approach starts with the types of cases that local authorities are choosing to prosecute. In particular, councils avoid prosecutions for contravening, or permitting the contravention of, s 9 of the Act (restriction on the use of land). They do this because there is often little, if any, physical damage that needs to be repaired and such prosecutions are not cost effective (the charges are expensive to prove and the fines imposed are low). This can be contrasted with contraventions (or permitting the contravention) of ss 12 to 15 of the Act (restrictions on the use of coastal marine area, certain uses of beds of lakes and rivers, water and discharges of contaminants into environment), which are prosecuted much more readily because they typically have identifiable damage and are (relatively) inexpensive to prove yet result in high(er) fines.<sup>2</sup>

However, the problem with this, from a criminal law perspective, is that there is unequal treatment of regulatees, with certain types of activity dealt with more leniently (or harshly) depending on the section of the Act that primarily regulates the activity. It also means that prosecution in general is no more than an “ambulance at the bottom of the cliff”. Local authorities are able to avoid certain types of cases because there are limited internal checks, and no external checks, on the exercise of their discretion not to prosecute.

### *A Outcomes*

The first consequence of the reparative gloss approach is that s 9 prosecutions are rare. For instance, the fourth and final prosecution report published by the Ministry for the Environment (in 2013) records that only 10% of cases included a s 9 breach, whereas 82% of cases included a s 12 to 15 breach.<sup>3</sup> However, this report does not compare the number of prosecutions for each section to the total number of breaches of each section, or the number of enforcement actions for each section, which leaves open the possibility that there are simply far more breaches of ss 12 to 15. As such, it is necessary to look to the National Monitoring System, which records the latter, but still not the former. Using 2016/2017 as an example, 18% of prosecutions brought were for a breach of s 9, whereas 79% of prosecutions

<sup>2</sup> Contraventions of s 11 of the RMA have been omitted, as enforcement action for these breaches is so infrequent. For instance, there were no enforcement actions taken in 2014/2015, four enforcement actions taken in 2015/2016 and twelve enforcement actions taken in 2016/2017.

<sup>3</sup> Ministry for the Environment *A study into the use of prosecutions under the Resource Management Act 1991: 1 July 2008 - 30 September 2012* (October 2013) at 13. The report notes that the total number of prosecutions used (501) does not equal the number of prosecutions in the period (429) because some prosecutions fitted more than one category. The remaining 8% of prosecutions were for contraventions of s 338(1)(b) (breach of an enforcement order) and/or s 338(1)(c) (breach of an abatement notice).

were for s 12 to 15 breaches.<sup>4</sup> However, 37% of the formal enforcement actions were for s 9 breaches, compared with 58% of formal enforcement action for s 12-15 breaches, suggesting that s 9 breaches are more likely to be dealt with by lower level measures than ss 12 to 15 breaches.

This can also be seen in the relative prosecution rates between territorial authorities and regional councils, since the former can only prosecute s 9 (and s 11) cases, whereas regional councils can prosecute the full range of breaches.<sup>5</sup> In 2014/2015 territorial authorities commenced, as between them and regional councils, only 26% of the prosecutions (17 as opposed to 48), yet issued 38% of the infringement notices (344 as opposed to 570) and 35% of the abatement notices (399 as opposed to 733).<sup>6</sup> The situation is even more stark in 2015/2016, with territorial authorities commencing, as between them and regional councils, 20% of the prosecutions (11 as opposed to 43), against a backdrop of issuing 51% of the infringement notices (424 as opposed to 402) and 58% of the abatement notices (902 as opposed to 649).<sup>7</sup> Finally, in 2016/2017 territorial authorities commenced, as between them and regional councils, 12% of the prosecutions (6 as opposed to 46), compared with 36% of the infringement notices (355 as opposed to 634) and 17% of the abatement notices (181 as opposed to 1,054).<sup>8</sup>

There are three (inter-related) reasons why the reparative gloss is responsible for this dearth of s 9 prosecutions. First, while these breaches may well have been committed intentionally, they often do not result in any identifiable damage, and therefore there is nothing to be repaired. For instance, the breach could relate to the density provisions in a District Plan, with the offender using their property for guest accommodation when this is not allowed. While this use may have an impact on the neighbouring properties, and threatens the integrity of the Plan, there is nothing physical to be “fixed”.

---

<sup>4</sup> Ministry for the Environment *National Monitoring System for 2016/17* (2018). There is no double counting in this data, as local authorities have to choose the “primary issue” and place the prosecution into the appropriate section: see Ministry for the Environment *National Monitoring System - information requirements: Guidance for the 2016/17 financial year* (2016) at 48. The remaining 3% of prosecutions were for “Other” breaches.

<sup>5</sup> See ss 30 and 31 of the RMA.

<sup>6</sup> Ministry for the Environment *National Monitoring System for 2014/15* (2016). It must be noted that the data tool on the Ministry for the Environment’s website incorrectly has the Waimakariri District Council as having commenced 17 prosecutions, yet the raw data, which is used in this thesis, has it only commencing one prosecution.

<sup>7</sup> Ministry for the Environment *National Monitoring System for 2015/16* (2017).

<sup>8</sup> Ministry for the Environment, above n 4.

Second, s 9 charges can be hard to prove, which means they are likely to be expensive. The starting point is that the default position for s 9 is that you can use land in any way that is not prohibited (by a national environmental standard, regional rule or district rule (as the case may be), or that contravenes ss 176, 178, 193 and 194), and then a series of allowances are also made (for instance, if the use is expressly allowed by a resource consent). Although “use” is defined broadly – for instance, it includes “alter, demolish, erect, extend, place, reconstruct, remove, or use a structure or part of a structure in, on, under, or over land”<sup>9</sup> – proving a breach of s 9 will often be complex, as the national environmental standard, or regional or district plan, may not be written with the clarity typically found in primary legislation.<sup>10</sup> This means that extensive (and costly) legal advice may be required, along with expert evidence, and the defendant may be more likely to challenge the prosecution case. Third, fines are frequently at the lower end of the spectrum and so the local authority will not recover much of its outlay (via the 90% rule in s 342(1) of the RMA). There is no tariff, or recent official data collected on this, but an analysis of the sentencing decisions for the 2016/2017 financial year shows that fines for s 9 cases were typically around the \$20,000 level,<sup>11</sup> with the largest fine during the year being \$40,000.<sup>12</sup> It is likely that, in the usual course, cost will therefore outweigh recovery.

<sup>9</sup> RMA, s 2(1) definition of “use”, paragraph (a)(i). In full, the definition provides that “use,-

(a) in sections 9, 10, 10A, 10B, 81(2), 176(1)(b)(i), and 193(a), means—

- (i) alter, demolish, erect, extend, place, reconstruct, remove, or use a structure or part of a structure in, on, under, or over land;
- (ii) drill, excavate, or tunnel land or disturb land in a similar way;
- (iii) damage, destroy, or disturb the habitats of plants or animals in, on, or under land;
- (iv) deposit a substance in, on, or under land;
- (v) any other use of land; and

(b) in sections 9, 10A, 81(2), 176(1)(b)(i), and 193(a), also means to enter onto or pass across the surface of water in a lake or river.

<sup>10</sup> As Brown notes, the plans “may be lengthy, ambiguous and reflect opposing objectives for the same subject matter. The rules that emerge from such a process may be worded awkwardly or be otherwise difficult to enforce”: Marie Brown *Last Line of Defence: Compliance, monitoring and enforcement of New Zealand's environmental law* (Environmental Defence Society, Auckland, 2017) at 39. For an example, see *R v Vortac New Zealand Ltd* [2017] NZDC 2280 at [53]. This may improve with the recently published National Planning Standards: Ministry for the Environment *National Planning Standards* (2019).

<sup>11</sup> See *Auckland Council v Fitzgerald* [2016] NZDC 13692 (\$20,000, converted to a discharge without conviction and enforcement order); *Auckland Regional Council v Motukaha Investments Ltd* [2016] NZDC 14078 (\$11,250); *Tauranga City Council v Jacko Basil Holdings Ltd* [2017] NZDC 3273 (\$23,000); *Queenstown Lakes District Council v Allenby Farms Ltd* [2017] NZDC 3251 (\$20,000); *Auckland Council v Zhang* [2017] NZDC 8208 (\$25,000); and *Auckland Council v Supa Homes Ltd* [2017] NZDC 12780 (\$21,000).

<sup>12</sup> *Wellington City Council v Patel* [2017] NZDC 6771.

This can be contrasted with prosecutions for ss 12 to 15 of the RMA, and especially s 15 (the most prevalent type of prosecution).<sup>13</sup> In such cases, there is more likely to be identifiable damage or the courts will make an allowance for harm.<sup>14</sup> Further, the default position is that the listed actions are not allowed – for instance, s 15 begins “[n]o person may discharge...” – making them easier to prove. Finally, average fines for breaches of ss 12 to 15 tend to be much higher than those for s 9. For instance, in the 2016/2017 financial year average fines were over \$40,000,<sup>15</sup> with penalties as high as \$135,000 imposed.<sup>16</sup> These breaches are, accordingly, much more cost-effective to prosecute – indeed, it is not inconceivable that a local authority could get so accustomed to prosecuting, say, s 15 breaches that (90%) of the fines imposed exceeded the cost incurred.

It is important to be clear that the argument is not that a local authority necessarily compares two prosecutable files, one with, say, a s 15 breach and one with a s 9 contravention, and prefers the former because the damage is more apparent and it will be easier and provide a higher fine. Rather, it starts earlier than that. When following up a s 9 complaint or undertaking monitoring (of a consent or generally) the enforcement officer will focus on whether there is any obvious damage. If there is none, then, even if the breach is clearly intentional, he or she will be aware that it could be a long, expensive prosecution, with little in the way of return, and so be more inclined to resolve the matter using lower level measures. As such, many s 9 breaches will not even reach the stage of being considered for prosecution.

However, even when there has been repeated non-compliance and it comes to considering a s 9 breach for prosecution, local authorities are reluctant to bring charges, except as a “last resort”. This is because there still may not, despite all the non-compliance, be any identifiable damage and costs will have escalated throughout the process (and a failure to comply to date indicates that the offender may try to defend a prosecution), but the fine will not increase at nearly the same rate. For instance, in *Tauranga City Council v Jacko Basil Holdings Ltd* issues about the property in question being used as two independent dwelling

---

<sup>13</sup> In 2016/2017, 70% of the prosecutions brought were under s 15: see Ministry for the Environment “Enforcement actions” (2017) <[www.mfe.govt.nz](http://www.mfe.govt.nz)>. The reasons why these prosecutions are so prevalent is discussed in Chapter 7.

<sup>14</sup> *Thurston v Manawatu-Wanganui Regional Council* HC Palmerston North CRI-2009-454-24, 25 & 27, 27 August 2010 at [41], citing *Plateau Farms Ltd v Waikato Regional Council* HC Rotorua CRI 2007-463-16, 17 September 2007 at [56] & [63].

<sup>15</sup> This was calculated by dividing total fines of \$1,228,548 by 28 prosecutions for breaches of ss 12 to 15, which equals \$43,876.

<sup>16</sup> *Northland Regional Council v Beejay Stud Ltd* DC Whangarei CRI-2016-088-759-760, 26 October 2016.

units had started back in 2008,<sup>17</sup> with an abatement notice being issued in 2010.<sup>18</sup> After a period when it appeared matters had been resolved, problems started again in 2014, and these continued until charges were eventually laid in 2016.<sup>19</sup> The defendants then tried to challenge the prosecution on the basis that it was outside the limitation period.<sup>20</sup> When this was unsuccessful, two of the (initially) three defendants pleaded guilty (charges against the third were, presumably, withdrawn, although this is not mentioned in the sentencing decision). Despite it being intentional offending and involving obstruction of the Council, the end result was only a fine of \$23,000 for the company and, upon payment of a \$5,000 contribution towards the Council's costs, a discharge without conviction for the individual (a shareholder of the company).<sup>21</sup>

On the other hand, local authorities are willing to move straight from non-compliance to prosecution for unintentional breaches of other sections of the Act, so long as there has been identifiable damage, as they know the court will treat the matter seriously. For instance, in *Southland Regional Council v Te Wae Wae Dairies Ltd* the Council, responding to a complaint of dairy farm effluent discharging into a waterway, in fact found three discharges (in total) from separate (neighbouring) farms operated by the defendant.<sup>22</sup> A prosecution was brought, despite it being “an unintentional but careless discharge with no more than a moderate proven effect on the environment because of the difficulties of establishing the specific adverse effects of an individual discharge”.<sup>23</sup> It was not even a systemic issue – the system had been checked by the Council only six days previously, so the Court proceeded on the basis that it was a “one-off”<sup>24</sup> – but was instead caused by the operations manager who was responsible for the system not undertaking checks of the irrigators or disposal fields required by the defendant's operating manuals and procedures.<sup>25</sup> Yet the Court still found the offending to be at the upper end of the moderately serious band and “perilously close to the most serious band”,<sup>26</sup> and a total fine of \$52,500 was imposed.<sup>27</sup>

---

<sup>17</sup> *Tauranga City Council v Jacko Basil Holdings Ltd*, above n 11, at [7].

<sup>18</sup> At [8].

<sup>19</sup> At [9].

<sup>20</sup> *Tauranga City Council v Jacko Basil Holdings Ltd* [2016] NZDC 17674.

<sup>21</sup> *Tauranga City Council v Jacko Basil Holdings Ltd*, above n 11, at [35]-[40].

<sup>22</sup> *Southland Regional Council v Te Wae Wae Dairies Ltd* [2017] NZDC 11466.

<sup>23</sup> At [13].

<sup>24</sup> At [15].

<sup>25</sup> At [14].

<sup>26</sup> At [19].

<sup>27</sup> At [21].



### *B Problems*

The reluctance to prosecute s 9 breaches is a problem because different activities are primarily regulated by different sections of the Act. For instance, matters relating to the use of residential and commercial properties will typically be subject mainly to s 9 restrictions, whereas the predominant section that (say) dairy farmers must comply with is s 15. As such, if a residential owner or commercial business and a dairy farmer commit breaches of equal gravity, but the former only receives a low level or informal enforcement response while the latter is prosecuted, then this is unequal treatment.

The obvious response is that the relative prosecution rates of s 9 breaches and breaches of ss 12 to 15 may simply be coming from the application of the Solicitor-General's Prosecution Guidelines.<sup>28</sup> While not mandatory, as noted in the previous chapter these are typically followed by local authorities, and they set out a test for prosecution that:<sup>29</sup>

Prosecutions ought to be initiated or continued only where the prosecutor is satisfied that the Test for Prosecution is met. The Test for Prosecution is met if:

5.1.1 The evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction – the Evidential Test; and

5.1.2 Prosecution is required in the public interest – the Public Interest Test.

Choosing what types of cases to prosecute sits squarely within the Public Interest Test.<sup>30</sup> In terms of the factors in favour of prosecution, it might be said that the anticipated penalty for a s 12 to 15 case is typically higher (one limb of the assessment of seriousness),<sup>31</sup> the offending (especially in the case of dairy farm effluent discharges) is prevalent,<sup>32</sup> and that there is a serious risk of harm.<sup>33</sup> On the other hand, factors against s 9 cases may include that it will result in a “very small or nominal penalty”,<sup>34</sup> the harm was minor,<sup>35</sup> the offence was “not on any test of a serious nature”,<sup>36</sup> and other “proper alternatives to prosecution are available”.<sup>37</sup>

---

<sup>28</sup> Crown Law Office *Solicitor-General's Prosecution Guidelines* (2013).

<sup>29</sup> At 5.1.

<sup>30</sup> It could be argued that s 9 breaches, being more difficult to prove, are more likely to not meet the Evidential Test, and this may account for less prosecutions. However, if this is the case then such breaches should not be attracting lower level enforcement responses either, and as shown in the previous subsection this is not the case.

<sup>31</sup> Crown Law Office, above n 28, at 5.8.1.

<sup>32</sup> At 5.8.6.

<sup>33</sup> At 5.8.12.

<sup>34</sup> At 5.9.1.

<sup>35</sup> At 5.9.2.

<sup>36</sup> At 5.9.3.

<sup>37</sup> At 5.9.13.

However, many of the arguments in favour of s 12 to 15 prosecutions could be made about s 9 cases. The first point to note is that the maximum penalty for the different breaches (the other limb of seriousness) is the same,<sup>38</sup> and it is arguable that one of the reasons the penalties for such breaches are low is because cases are brought so infrequently. For instance, penalties for dairy farm effluent discharges continue to be raised because cases keep coming before the courts,<sup>39</sup> and so if local authorities instituted a policy of readily prosecuting s 9 cases then it could be expected that there would be a similar jump. Second, as can be seen by the number of formal enforcement responses (and there is likely to be a lot of informal enforcement), s 9 breaches are clearly prevalent. Third, there is still harm caused by many of these breaches, it is just more indirect, and an “allowance for harm” could be made in just the same way it is in discharge cases where no direct damage can be identified.<sup>40</sup> In many ways, s 9 breaches are more serious, as they are often committed intentionally and if a local authority does not maintain the integrity of its plan then the wider community will be led to believe that it can offend with impunity. Such points would also negate the factors against s 9 prosecutions, except that “proper alternatives to prosecution are available”, but this factor could equally be said to be true for s 12 to 15 breaches.<sup>41</sup>

Even when an industry is regulated by both s 9 and ss 12 to 15, there can be problems with avoiding prosecutions for the former. For instance, those involved in, say, forestry may be relying on permitted activity rules or a resource consent to operate. If they commit a “technical” breach of these rules or their consent conditions (as the case may be) they may then be acting contrary to s 9 of the Act, but as noted in the previous subsection the responsible local authority is likely to only deal with it using informal or lower level measures, even if it was committed intentionally.<sup>42</sup> However, the technical breach may indicate that there is a systemic problem, which could manifest itself in a substantive (that is, direct) and damage causing breach. While the local authority may, of course, prosecute when

---

<sup>38</sup> RMA, s 339(1).

<sup>39</sup> See, for example, the comments in *Southland Regional Council v Baird* [2018] NZDC 11941 at [25].

<sup>40</sup> Note, however, that it has been suggested that an allowance for harm is not appropriate in any cases, with Jareborg arguing that “if a distinct harm occurs – a river is, e.g., heavily polluted – as a result of many separate acts by many separate individuals it is unfair to treat these individuals as if they had acted in concert”: Nils Jareborg “What Kind of Criminal Law do we Want?” in Annika Snare (ed) *Beware of Punishment: On the Utility and Futility of Criminal Law* (Pax Forlag, Oslo, 1995) at 32.

<sup>41</sup> Another argument is that the “statutory objectives and enforcement priorities” of a local authority, and “cost”, may support avoiding s 9 prosecutions (Crown Law Office, above n 28, at 5.10 and 5.11 (respectively)). However, it is suggested that these factors only apply in a case-by-case situation, not an across-the-board policy that s 9 cases are not important and/or will not be prosecuted because they are too expensive. The fact that this is not an explicit policy of any local authority, in any of the enforcement policies reviewed, suggests that this justification is not (openly) be relied on.

<sup>42</sup> For a discussion on “technical breaches”, see Chapter 4.

this happens, so long as it is in fact detected,<sup>43</sup> the damage has happened and there is no guarantee it will be repairable. Ultimately, by (largely) refusing to bring charges for s 9 breaches prosecution is being treated as an “ambulance at the bottom of the cliff”, something that happens only after there is identifiable damage, and it is doing little to protect the environment. Yet the system encourages this by “increasing” the fine (and so recovery to the council) if the prosecution can show there has been prior non-compliance with the Act, thus providing an incentive to hold off bringing charges until earlier measures have failed.<sup>44</sup>

The point is not to suggest that s 12 to 15 breaches do not warrant prosecuting – they do. Rather, s 9 breaches of equal or greater seriousness should be treated in the same way, even if they are more expensive to prove and the return is not as high. Otherwise, a defendant who has been prosecuted for an accidental discharge of contaminants could feel a real sense of unfairness when they see someone else, in another industry, intentionally breaching the Act and repeatedly being warned. Further, the public is given the inaccurate message as to the pattern of offending that is happening in their region and little is being done to protect the environment. Some sympathy could perhaps be had for regional councils, as with restricted enforcement budgets not every prosecution is able to be taken, and so it is understandable they prefer those with the most visibility (in terms of damage) and the greatest recovery. But for territorial authorities there is no such excuse. They do not, by and large, need to compare a s 9 breach with breaches of the other sections of the Act, and so it is difficult to accept that, of all the (likely, thousands of) breaches of s 9 that occurred in 2016/17, only six of these were serious enough for territorial authorities to prosecute.

### *C How Can This Happen?*

Local authorities have been able to avoid s 9 cases because the internal and external checks on which prosecutions they are, and more importantly are not, bringing are insufficient. In terms of internal checks, this remains the case despite most (at least large) local authorities now using an enforcement panel for determining whether or not to bring a prosecution. By way of example, Environment Southland’s Enforcement Policy notes:<sup>45</sup>

If a matter is either complex, has a high public profile, requires specific guidance or there is no precedent, then the matter is elevated to an enforcement panel which is convened to make the decision to advance the matter for a legal opinion.

---

<sup>43</sup> As to the issues with detection, see Chapter 4.

<sup>44</sup> The fine is “increased” because, as noted in Chapter 5, any discount from the starting point for good character will generally be negated by previous non-compliance with the Act.

<sup>45</sup> Environment Southland *Compliance Policies* (2017) at 18.

The enforcement panel is comprised of three Environment Southland managers. The panel's main task is to assess the public interest or risk test.

Once a decision has been reached the matter is either re-evaluated or subjected to independent legal review.

...

Once the matter has a legal decision, the entire file is reviewed by the chief executive who makes the ultimate decision to proceed.

The first point is that, for the matter to even be considered for prosecution, the breach must be put forward to the panel for consideration and, as noted in section IIA above, the enforcement officer may instead simply deal with the breach using informal or low level measures, and can typically do so autonomously.<sup>46</sup> But even if the breach reaches the panel, the process then followed is problematic. As mentioned in the previous subsection, the Solicitor-General's Prosecution Guidelines set out a two-stage test, involving first a consideration of whether the "evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction" and then, if so, whether "[p]rosecution is required in the public interest".<sup>47</sup> However, as the Environment Southland policy makes clear, the local authority is primarily assessing the second factor, but is doing so before the first factor has been (legally) considered. As such, if the legal representative advises that there is insufficient evidence to prosecute, then the enforcement panel's public interest consideration has been pointless. But if there is sufficient evidence to prosecute, then the legal representative is unlikely to tell the local authority, which is the "expert" for the purpose of the public interest part of the test and has already considered that this is met, that it is not in fact in the public interest. What this means is that the primary "internal" check on a local authority, therefore, is a legal one (whether or not there is sufficient evidence), rather than the more important check on whether it is using its discretion to prosecute (or not) properly.

In any event, whether or not the Solicitor-General's Prosecution Guidelines have been followed by local authorities is somewhat academic, as there has, at least historically, been no external checks on council prosecution decisions.<sup>48</sup> Local authorities do not come within the

---

<sup>46</sup> See the discussion in Chapter 5.

<sup>47</sup> Crown Law Office, above n 28, at 5.1-5.2.

<sup>48</sup> This may change with the RMA enforcement oversight unit that has been established at the Environmental Protection Agency (see Hon David Parker MP "Resource Management Act oversight unit to be established" (press release, 17 May 2018), although a recent article has suggested that the unit's abilities are severely limited (see Farah Hancock "RMA oversight unit 'not fit for purpose'" *Newsroom* (online ed, Wellington, 19 November 2019). The situation may be different again if the Environmental Protection Agency is given, as proposed, the power to take enforcement action directly: see Cabinet Paper *Proposed Resource Management Amendment Bill*:

general oversight of the Solicitor-General,<sup>49</sup> because the prosecutions they bring are not “public prosecutions”.<sup>50</sup> Further, the Ministry for the Environment does not appear to be involved in reviewing these decisions.<sup>51</sup> Unless there is any public reporting by the local authority that it is *not* prosecuting, which is rare, the community equally has no idea that serious cases are being dealt with by lower level measures.

### *III Resolving Cases in Court – Plea Bargains by Deep Pockets*

The reparative gloss approach also impacts on how cases are resolved in court, in two ways. First, it means that local authorities are often entering into plea bargains with defendants in order to resolve cases by way of a guilty plea (or pleas) and an agreed summary of facts. Second, such resolutions are preferentially (that is, out of all the defendants originally charged) with a company. This is because avoiding a trial (and a disputed facts hearing) will minimise costs, and proceeding against a non-natural person will maximise recovery.

However, the problem with this, from a criminal law perspective, is that in order to achieve these outcomes local authorities can be required to act in an unprincipled manner, by either overcharging when they commence a prosecution or giving away “legitimate” charges, defendants or facts when resolving it. In a similar vein, councils need to make resolution decisions based on which defendant will pay the highest fine, not who is the most culpable. Local authorities are able to enter into such arrangements because there is no oversight from the Solicitor-General, the courts will rarely intervene so long as “someone is pleading guilty to something”, and councils only ever publicise the end result and not the arrangements that took place to arrive at it.

#### *A Outcomes*

The first way that the reparative gloss approach is impacting on how cases are resolved in court is that it is leading local authorities to enter into plea bargains in order to resolve cases by way of a guilty plea (or pleas) and an agreed summary of facts. However, before discussing this, it can be observed that the umbrella term “plea bargaining” can in fact be

---

*Stage 1 of a resource management system review* (2018) at 10-11; Resource Management Amendment Bill 2019 (180-1), cl 66.

<sup>49</sup> Criminal Procedure Act 2011, s 185.

<sup>50</sup> As defined in s 5. This point is returned to in Chapter 7.

<sup>51</sup> See the discussion in Chapter 5 about the oversight from the Ministry for the Environment.

divided into a number of different types.<sup>52</sup> The first is “strict plea bargaining”, which means pleading guilty to the charges and facts as alleged by the prosecutor in return for a sentence discount.<sup>53</sup> The second and third are “fact bargaining” and “charge bargaining”, which involve, respectively, the defendant pleading guilty to the charges as alleged in return for the prosecutor agreeing to amend the summary of facts to read more favourably to him or her, and the defendant pleading guilty to one or more charges in return for one or more other charges being withdrawn. The fourth is “defendant bargaining”, whereby the prosecutor accepts a guilty plea (or pleas) by a defendant (or defendants) and in return withdraws the charge(s) against a co-defendant (or co-defendants). The more precise terms “fact bargaining”, “charge bargaining” and “defendant bargaining” are used instead of “plea bargaining” as much as possible.

In terms of resolutions by guilty pleas, the final prosecution report notes that in 85% of cases a guilty plea was entered, with this figure ranging between 80% and 91% in the preceding three periods.<sup>54</sup> While there is no data on the percentage of guilty pleas entered since then, there is nothing to suggest that this has decreased.<sup>55</sup> While the high proportion of guilty pleas reflects, to an extent, that local authorities tend to only bring clear cases,<sup>56</sup> it is suggested that the primary factor driving this is charge bargaining. This can be seen by the fact that the outcome of a large number of RMA charges is “Not proved”, with such definition including where charges are withdrawn by the prosecutor or no evidence has been offered.<sup>57</sup> For instance, in 2016/2017 of the 387 charges resolved, only 168 (43%) ended in “Convicted” or “Other proved”, the remaining 219 (57%) being “Not proved”.<sup>58</sup> Given how few cases are argued at trial (and so there will be only a minimal number of acquittals), the implication is that so many charges are “Not proved” because they have been withdrawn by the prosecutor in return for the defendant pleading guilty to other charges.<sup>59</sup>

---

<sup>52</sup> Andrew Ashworth and Mike Redmayne *The criminal process* (3rd ed, Oxford University Press, New York, 2005) at 269-296; RA Duff and others *Trial on Trial : Volume 3: Towards a Normative Theory of the Criminal Trial* (Hart Publishing, Oxford, 2007) at 169-180.

<sup>53</sup> The leading authority is *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607, which sets a maximum discount for guilty plea of 25%.

<sup>54</sup> Ministry for the Environment, above n 3, at 16.

<sup>55</sup> Indeed, in the 2016/2017 sentencing cases reviewed, guilty pleas were entered in 33 of the 36 cases (92%).

<sup>56</sup> See the discussion in Chapter 5.

<sup>57</sup> Letter from Ministry of Justice to Mark Wright regarding Official Information Act 1982 request (23 February 2018) at Appendix 1.

<sup>58</sup> This includes “Youth Court proved, discharge without convictions and Adult diversion/Youth Court discharge”: at Appendix 1.

<sup>59</sup> Some of these “Not proved” charges will also be alternative charges, whereby the prosecution is only seeking a conviction on one of the two alternatives.

In terms of agreement on facts, there is no data on the number of disputed facts hearings, but they appear to be relatively rare. For instance, of the 36 cases considered in 2016/2017, none were subject to such a hearing. It is much more likely that one will see reference in a sentencing decision to a disputed facts hearing having been considered, but that matters were resolved by the time of sentencing.<sup>60</sup> The implication is that negotiations pertaining to the summary of facts are rife – and there is evidence to support this<sup>61</sup> – and these nearly always seem to result in an agreed document. Given that the summary of facts is prepared by the local authority, and so it will state the facts at their highest to begin with, it will only be amended “down” to favour the defendant.

Guilty pleas are so important because of the financial implications to the local authority of not guilty pleas. With not guilty pleas where the defendant elects trial by Judge alone, the cost to the council increases markedly from what would be incurred when a defendant pleads guilty – there are additional administrative hearings and sometimes pretrial hearings, the council will need to prepare evidence (which may involve the engagement of experts, if this has not already happened), and then conduct a trial (including the possibility of submissions on liability after the hearing has concluded). In terms of recovery, the fine is, at worst, reduced to zero (if the defendant is acquitted) and, at best, only “increases” by the amount of guilty plea discount the defendant would have received.<sup>62</sup> In short, the cost of prosecuting may rise from the low tens of thousands of dollars to the hundreds of thousands of dollars,<sup>63</sup> but, other than in very serious cases,<sup>64</sup> the “increase” in fine will pale in comparison to the additional expense (not to mention the time and inconvenience) to the council.<sup>65</sup> This means that the recovery the local authority receives, as a proportion of its costs, will decrease markedly.

---

<sup>60</sup> See, for example, *Canterbury Regional Council v Rutherford* [2018] NZDC 17098 at [30].

<sup>61</sup> For instance, in *Waikato Regional Council v Fulton Hogan Ltd* [2018] NZDC 2711 Judge Harland stated (at [40]) that “[t]here is a practice that appears to be developing in relation to prosecutions under the RMA where some time is spent negotiating an agreed Summary of Facts.”

<sup>62</sup> A maximum of 25%: see *Hessell v R*, above n 53. This “increase” has been referred to as a “*de facto* sentence penalty for pleading not guilty”: see Richard Young and Andrew Sanders “The Ethics of Prosecution Lawyers” (2004) 7(2) *Legal Ethics* 190 at 208 (their emphasis).

<sup>63</sup> Ministry for the Environment *Compliance, monitoring and enforcement by local authorities under the Resource Management Act 1991* (2016) at 25.

<sup>64</sup> For instance, in *Taranaki Regional Council v Fonterra Ltd* [2015] NZDC 14962, the penalty would have (all other things being equal) been \$144,000, instead of \$192,000 (a difference of \$48,000), had the defendant pleaded guilty at the first available opportunity.

<sup>65</sup> For instance, in *Auckland Council v Zhang*, above n 11, the penalty would have (all other things being equal) been \$26,250, instead of \$35,000 (a difference of \$8,750), had the defendant pleaded guilty at the first available opportunity. Instead, the matter was subject to a five day defended hearing, as well as a sentencing hearing and an appeal to the High Court. There had also been a pre-trial hearing, which had been (unsuccessfully) appealed to the High Court, with leave declined for a further appeal to the Court of Appeal.

The issue is slightly different when a defendant pleads not guilty and elects trial by jury.<sup>66</sup> The cost difficulty does not arise, as the local authority is no longer required to pay legal expenses once the matter becomes a Crown prosecution and is taken over by the local Crown Solicitor's office (although some councils may still pay for the preparation of evidence).<sup>67</sup> However, local authorities believe that there "have been a number of perverse jury acquittals for regulatory offences of this nature",<sup>68</sup> and there will obviously be no recovery if the offender is found not guilty (the local authority still receives 90% of the penalty even if the defendant elects trial by jury).<sup>69</sup> For instance, in *Bay of Plenty Regional Council v Rotorua District Council*, the prosecuting regional council was concerned that the defendant territorial authority may be acquitted if the jury became aware that they will (as ratepayers) be responsible for any fine, and the Regional Council applied successfully on this basis to have the trial transferred from Rotorua to Hamilton.<sup>70</sup>

Agreement on facts is also important for financial reasons, as a failure to achieve this means that a disputed facts hearing, and the time and cost associated with it (preparation of evidence and legal expenses), will be required.<sup>71</sup> While a disputed facts hearing can also lead to a higher fine, in that the prosecutor may be able to "sheet home" a greater level of harm or

---

<sup>66</sup> Defendants are able to do this because RMA breaches are category 3 offences: see Criminal Procedure Act 2011, ss 6 and 50.

<sup>67</sup> Ministry for the Environment *Best Practice Guidelines for Compliance, Monitoring and Enforcement under the Resource Management Act 1991* (2018) at 40; Bay of Plenty Regional Council *2016/2017 Regulatory Compliance Report* (2017) at 54.

<sup>68</sup> Local Government New Zealand *RMA Sector Position Paper: Draft for feedback* (2015) at Appendix A. See also Warren Adler *The state of the compliance and enforcement regime under the Resource Management Act 1991* (Strategik Group, 2008) at 32. Although not a RMA case, an example of this might be the prosecution of Paul Jones by the Civil Aviation Authority (*Jones v Civil Aviation Authority* DC Hamilton CRI-2007-019-1042, 2 October 2008). Mr Jones (at [1]) "successfully defended before a jury a charge relating to a flight which ended in an arrival at Ohakea, where the plane in which he was flying crashed and where it was alleged that the occupants of the aircraft and the aircraft itself were flown in such a way as to cause unnecessary danger". Following his acquittal, Mr Jones applied for costs against the Civil Aviation Authority, and in dismissing his application Judge Wolff noted that (at [5]) "[a]s to the scientific evidence, the defence experts contended for a theory that appears not to correspond to any known law of aerodynamics, or Newton's law of physics" and (at [6]) were "so partisan that their essential view was that if Mr Jones did it, it was right, and if he did not do it, it would have been the wrong thing to do". His Honour put the acquittal down to (at [7]) "the exercise of Jury Nullification, namely a jury will acquit in cases where it simply feels that it is not right to convict", on the basis that "[i]t is plain that Mr Jones was a capable pilot, that they he made an error on this occasion he was a man of impeccable character" and that he "appears to have been caught up in the present case in a political debate".

<sup>69</sup> There are indications that defendants are increasingly electing trial by jury (see, for example, Bay of Plenty Regional Council, above n 67, at 54), which may be because they have become aware of the dislike by local authorities of this ability, and are doing so purely to gain a tactical advantage. Note also that the courts have expressed concerns about juries in RMA trials, at least where they involve "mixed questions of fact and law that need to be determined in the context of the interpretation of a Plan": see *R v Vortac New Zealand Ltd*, above n 10, at [53].

<sup>70</sup> *Bay of Plenty Regional Council v Rotorua District Council* DC Rotorua CRI-2017-063-3437, 27 March 2018. An appeal against this was allowed: see *Waste Management NZ Ltd v Bay of Plenty Regional Council* [2018] NZCA 171.

<sup>71</sup> See also the discussion in Chapter 5.



culpability and the discount for a guilty plea can be affected when such a hearing is required,<sup>72</sup> it can also lead to a reduced fine if the defendant has been successful in the hearing. It becomes a matter of weighing up the possible increase in the fine, which will depend on the local authority being successful in proving the facts and this translating into an increased fine, against the (certain) cost that will come with arguing the matter. Given the risk aversity of councils, it is no surprise that this course is not favoured.<sup>73</sup>

The reparative gloss approach therefore leads local authorities to enter into arrangements with defendants whereby a guilty plea (or pleas) is entered to one or more charges (in return for one or more charges being withdrawn), and the summary of facts is agreed (in return for it being “watered down”). However, there is a second aspect to these in-court resolutions. The preferred resolution, from the perspective of the local authority, is that the guilty plea (or pleas) is entered by a company, and this is achieved by defendant bargaining.

This preference for non-natural persons can partially be seen in the fact that a (slightly) higher proportion of RMA convictions are against companies than individuals.<sup>74</sup> But what is more telling is that, where both a company and an individual could be jointly prosecuted, a company is almost always included in the resolution.<sup>75</sup> It is, of course, the case that sometimes the individual(s) is convicted as well (although the practice relating to this appears to vary throughout the country),<sup>76</sup> but the reverse – an individual is convicted and charges against the company are withdrawn – is incredibly rare, happening only when the company has become insolvent before the charges have been resolved.

Obtaining a guilty plea from a company is frequently achieved by the local authority entering into an arrangement with the defendants who have been charged whereby the company will plead guilty in return for the proceedings against the individuals, often the directors, being withdrawn.<sup>77</sup> This is only sometimes referred to in the sentencing decision.<sup>78</sup> As such, it is

---

<sup>72</sup> See *Hessell v R*, above n 53, at [61]; *Bay of Plenty Regional Council v Specialised Container Services (Tauranga) Ltd* [2018] NZDC 23159 at [43].

<sup>73</sup> See the discussion on the risk aversity of councils in Chapter 5.

<sup>74</sup> For instance, of the 59 defendants in the cases reviewed in the 2016/2017 financial year, 32 (54%) were companies and 27 (46%) were individuals.

<sup>75</sup> While the conviction of a director or manager using s 340(3) of the RMA requires there to first be a corporate conviction, this is not the case with a “permitting” charge under s 338(1), and, as will be discussed in Chapter 7, this latter course is far more prevalent.

<sup>76</sup> Compare the related cases of *Otago Regional Council v Liquid Calcium Ltd* [2017] NZDC 11458 and *Otago Regional Council v Jury* [2017] NZDC 8895 with *Canterbury Regional Council v Aitkens Road Dairies Ltd* [2019] NZDC 3190.

<sup>77</sup> An example of this can be seen in the West Coast Regional Council *Minutes of the Meeting of the Resource Management Committee* (10 October 2017). The Minutes record (at 3) that the Council offered the corporate

perhaps best seen by the fact that, in 2016/2017, of the 145 separate defendants who had charges resolved against them, charges were only proved against 76 of these defendants (52%).<sup>79</sup> The remaining 69 defendants (48%) had all of the charges against them “not proved” – that is, they were acquitted or, more likely given how few cases are taken to trial, had their charges withdrawn or dismissed following a plea arrangement.

The preference for proceeding against companies arises because the maximum monetary penalty is twice as high for non-natural persons as for natural persons,<sup>80</sup> with such difference being reflected (albeit not to the same extent) in starting points adopted, and therefore typically the fine imposed. For instance, in *R v Yealands* the sentencing Judge, after noting that the starting point in a similar, but more serious, case had been \$45,000, commented that a “starting point of \$15,000 is appropriate in this case, bearing in mind the maximum penalty for Mr Yealands is half that which applied for Babich as a corporate defendant.”<sup>81</sup> As such, a local authority can expect, all other things being equal, a greater return if the defendant convicted is a non-natural person.

Further, there is little to be gained, in terms of recovery to the local authority, from related individuals being convicted along with the company. This is because where the defendants are “one and the same for practical fiscal purposes...the total penalty imposed must be tailored accordingly”,<sup>82</sup> and this typically means dividing the one penalty between them.<sup>83</sup> A local authority can therefore withdraw the charges against such individuals (often directors) at no “cost”, in return for the company pleading guilty (thereby achieving a better return for the local authority).

## B Problems

Negotiations and resolutions within a prosecution are common, and indeed are frequently appropriate. Indeed, as the Solicitor-General’s guidelines state, “[p]rincipled plea discussions and arrangements have a significant value for the administration of the criminal justice

---

defendant “a resolution, which they then accepted a year later, which was to plead guilty and the charges against [the director] would be dropped but at the time, they decided not to do this.” They “ultimately pled guilty to exactly the same terms that [the Council] wrote to them with this time last year”.

<sup>78</sup> See, for example, *R v ANZ Auto Parts Ltd* [2016] NZDC 22102 at [2].

<sup>79</sup> Ministry of Justice, above n 57, at appendix 1; Letter from Ministry of Justice to Mark Wright regarding Official Information Act 1982 request (clarification) (19 March 2018) at 1. Proved outcomes include “Convicted and Other proved (Youth Court proved, Discharge without conviction and Adult diversion/Youth Court discharge).”

<sup>80</sup> \$600,000 as opposed to \$300,000: see RMA, s 339(1).

<sup>81</sup> *R v Yealands* [2018] NZDC 4115 at [88].

<sup>82</sup> *Kiwi Drilling Company Ltd v R* (1997) 4 ELRNZ 23 (CA) at 28.

<sup>83</sup> See, for example, *Hardegger v Southland Regional Council* [2017] NZHC 469.

system”.<sup>84</sup> However, plea bargaining to achieve the goals of guilty pleas, agreed summaries of facts and corporate convictions, in the manner it is happening here, is problematic. This is for various reasons.

First, there is evidence to suggest that local authorities are sometimes either “overcharging” when commencing a prosecution or reaching resolutions that do not reflect the “essential criminality of the conduct”, in order to secure the desired resolution. “Overcharging” (in its broadest sense) occurs when a prosecutor charges unnecessary defendants and offences, and states the facts higher than it can believe it can prove, so that it has “bargaining chips” to give away to reach a resolution.<sup>85</sup> However, this is contrary to the Solicitor-General’s guidelines, which make the fundamental point that the “nature and number of the charges filed should adequately reflect the criminality of the defendant’s conduct as disclosed by the facts to be alleged at trial”.<sup>86</sup> Further, the guidelines go on to state that the “number or seriousness of charges should not be inflated to increase the likelihood of an offer by the defendant to plead guilty to lesser charges”,<sup>87</sup> and the same applies to what defendants are prosecuted, the guidelines stating that “[c]harges against multiple defendants should be filed only where that is necessary to put the full picture before the fact-finder, or the person charged has played more than a minor role in the offending.”<sup>88</sup> This is because overcharging.<sup>89</sup>

...means that some charge bargains hold no true advantage for the defence and only for the prosecution. By appearing to reduce the charge(s), the prosecutor obtains a plea of guilty to the offence that should really have been charged in the first place.

There have been allegations of overcharging made against local authorities. For instance, in *Auckland City Council v North Power Ltd* the proceedings began with six defendants (North Power Limited and five of its directors) facing 72 charges, but it was resolved by the defendant company (only) pleading guilty to two of these charges.<sup>90</sup> After setting this out, the Court noted that it:<sup>91</sup>

---

<sup>84</sup> Crown Law Office, above n 28, at 18.1.

<sup>85</sup> For a frank reference to charges being used as “bargaining chips” and the consequences for a guilty plea discount, in the context of the Securities Markets Act 1988, see *R v Talbot* [2019] NZHC 773 at [34].

<sup>86</sup> Crown Law Office, above n 28, at 8.1.

<sup>87</sup> At 8.2. See also 18.7.1.

<sup>88</sup> At 8.5.

<sup>89</sup> Ashworth and Redmayne, above n 52, at 273.

<sup>90</sup> *Auckland City Council v North Power Ltd* DC Auckland CRN 3004510188 & 191, 27 May 2004 at [20]. See also *Gu v Auckland Council* [2017] NZDC 29242 where (at [11]) it was argued – unsuccessfully – by the defendant that the charges against her should be stayed because the prosecutor had “simply charged everyone it

... does not wish to discourage in any way the resolution of matters in the criminal jurisdiction by an agreement that an informant will seek leave to withdraw less appropriate charges in return for the defendant pleading Guilty to the more appropriate charges. This however does not justify the laying of an excessive number of charges in a “scattershot” manner, including charges against directors where there could be no suggestion of any culpability on their individual parts - e.g. because they were aware of previous infringements and had failed to take steps to prevent a repetition, or had deliberately proceeded to “cut corners” in order to save costs.

The other means of securing desired resolutions is entering into arrangements that do not reflect the “essential criminality of the conduct”. This occurs when a local authority has commenced a prosecution strictly in accordance with clause 8.1 of the Solicitor-General’s Guidelines, but then finds it needs to “give away” legitimate defendants, charges or facts in order to get guilty pleas and agreement on facts. But if the charges no longer reflect the “essential criminality of the conduct”, and do not “provide sufficient scope for sentencing to reflect that criminality”, then this is also contrary to the Solicitor-General’s Guidelines.<sup>92</sup> This is because the defendant will be treated more leniently, on sentencing, than they deserve.

It is difficult to find clear examples of legitimate charges or facts being “given away” in return for guilty pleas to other charges, as whether the local authority had sufficient evidence to ground the charge or the fact is possessed by the local authority and obviously not publicised. However, in terms of withdrawing charges against legitimate defendants one can consider the case of *Waikato Regional Council v Okawa Ltd* as a possible example.<sup>93</sup> *Okawa Ltd* and its director, and *Greener Earthmoving Ltd* and its director, each faced a charge relating to unlawfully permitting the excavation of the bed of a river. The effect of the offending on the environment was “significant”<sup>94</sup> and there was no suggestion that there was insufficient evidence against the directors – indeed, the director of *Okawa Ltd* was described as having been told of the need for a resource consent and his behaviour to proceed regardless was “reckless”, and the director of *Greener Earthmoving Ltd* was “careless but of the highest

---

could identify without proper consideration of whether it had admissible evidence to support charges against all of the defendants”, and that this amounted to misconduct by the prosecutor. See also [36]-[43].

<sup>91</sup> *Auckland City Council v North Power Ltd*, above n 90, at [21].

<sup>92</sup> Crown Law Office, above n 28, at 18.6. See also 18.7-18.8. But see Duff and others, above n 52, where the authors consider that in a situation of insufficient resources to prosecute all cases (at 176) “the cost of prosecution can legitimately guide a prosecutor to abandon prosecuting a defendant for a more serious charge, rather than abandoning a prosecution in a case where no agreement is available, hence giving up an opportunity to achieve retributive justice in that case altogether.”

<sup>93</sup> *Waikato Regional Council v Okawa Ltd* [2018] NZDC 7725.

<sup>94</sup> At [46].

degree”<sup>95</sup> – yet at the outset of the sentencing the two companies entered pleas of guilty and the prosecutor sought to withdraw the charges against the two directors.<sup>96</sup>

This is related to the next problem. Given the desire for a non-natural person to be the primary defendant, this means that a local authority might withdraw charges against a more culpable individual in return for a guilty plea from a less culpable company. This may seem strange, because culpability is one of the chief determinants of sentence.<sup>97</sup> However, it happens because the fine for the less culpable company may still be higher than the fine for the more culpable individual, given the higher maximum penalty for non-natural persons than natural persons and the effect this has had on relative fines for natural and non-natural persons.

In some situations, it may be entirely appropriate to prefer the prosecution of a (slightly less culpable) company over a (marginally more culpable) individual, such as where the offending was brought about by both systemic faults by the company (that allowed an environment in which a breach could occur) and a specific fault by an employee (that directly caused the breach).<sup>98</sup> This is because the benefits (for instance, from delaying maintenance costs) will have primarily been received by the company and the burden of the penalty (the fine and conviction) will likely be easier for the company to manage. Further, there is a sense of unfairness where an employee makes a mistake during the course of his or her employment – such as failing to move an effluent irrigator that has completed its run – and ends up with a conviction and fine.

However, when the individual is much more closely connected to the company, say as a director, such an arrangement is more troublesome. The director may well be the reason that the company has not invested in new infrastructure to prevent the systemic problem, yet escapes without a conviction and penalty because there is simply no benefit to the local

---

<sup>95</sup> At [47]-[56].

<sup>96</sup> At [4].

<sup>97</sup> See Chapter 5.

<sup>98</sup> There seems to be some support for this in *Canterbury Regional Council v A & H Dairies Ltd* [2017] NZDC 1414, where the sentencing Judge stated (at [34]) “[t]he first matter I should take into account is that there are three offenders. The third one is not before the Court today because he is taking part in a restorative justice system. I think that is appropriate given he is an individual. It is always of slight concern when share milkers are charged but directors of companies are not and I am happy with the situation before me where it is now the two companies before me”. However, it appears that the individual was in fact both the share-milker and a director of one of the defendants (see *Canterbury Regional Council v Shaskey* [2017] NZHC 2540 at [1]). As recorded in this decision and *Canterbury Regional Council v Shaskey* [2017] NZDC 18498, the restorative justice system became problematic and was ultimately not pursued, with the defendant instead discharged without conviction, following which he was granted costs, which were quashed on appeal.

authority from pursuing him or her. This is because of the “one and the same for practical fiscal purposes” rule,<sup>99</sup> and the higher cost involved if the defendants advise that they will take the matter to trial unless the charges against the director are withdrawn.

This problem is magnified by the provisions of the Sentencing Act 2002. If the local authority believes that the (less culpable) company can afford to pay a fine and the (more culpable) individual cannot, it will be encouraged to accept the plea from the former. This is because the individual may have his or her fine reduced,<sup>100</sup> and/or converted to a community based sentence,<sup>101</sup> thereby lowering or eliminating (respectively) the expected recovery.<sup>102</sup> Even if both can afford to pay a fine, the local authority will be inclined to choose the wealthier of the two, on the basis that, pursuant to s 40(1) of the Sentencing Act 2002, the wealthier defendant may have its fine increased and the poorer defendant might have his or her fine decreased.

### *C How Can This Happen?*

The first reason that local authorities have been able to resolve prosecutions by way of plea bargains that involve guilty pleas, agreed summaries of facts and corporate convictions is that, as with choosing what types of cases to prosecute, there is no oversight by the Solicitor-General or, it would seem, the Ministry for the Environment. Again, these are not “public prosecutions” and the Ministry asks no questions in its National Monitoring System about the number of charges or defendants in each of the prosecutions brought by local authorities, or their outcomes, focussing solely on the number of cases initiated.

On the other hand, unlike the decisions regarding what types of cases local authorities bring, the courts do have some responsibility over these resolutions. However, other than in extreme cases, they will not intervene. The Judge has no influence on the summary of facts at all – he or she will likely not see any previous drafts before the agreed summary of facts is filed – and, while leave is required to withdraw a charge,<sup>103</sup> in practice this will typically be granted so long as some charges remain.<sup>104</sup> Even if the Judge refused leave, it is very

---

<sup>99</sup> *Kiwi Drilling Company Ltd v R*, above n 82, at 28.

<sup>100</sup> Section 40(1).

<sup>101</sup> Section 15(1)(b).

<sup>102</sup> As Bishop notes, “solvent offenders are not necessarily the most serious polluters and, as such, the hypothecation of penalty receipts may operate counter-productively, with the environment suffering as a result”: Patrick Bishop “Criminal law as a preventative tool of environmental regulation: compliance versus deterrence” (2009) 60(3) Northern Ireland Legal Quarterly 279 at 302.

<sup>103</sup> Criminal Procedure Act 2011, s 146.

<sup>104</sup> For the situation where the prosecution is seeking leave to withdraw all charges, see section IV below.

difficult, practically, to require a local authority to prosecute a charge, as if no evidence is offered the Court will have little option but to dismiss the case.<sup>105</sup>

Nor will the public often have any idea that such plea arrangements have taken place. Only some sentencing decisions make reference to charges that have been withdrawn and the defendants who are no longer part of the prosecution, and local authorities do not publicise this aspect of proceedings. Rather, the press releases issued by local authorities only refer to the end result (and are only issued if the local authority has been successful).

Finally, it is also very difficult to obtain this information from local authorities directly. For instance, a request under the Local Government and Official Information and Meetings Act 1987 to the Otago Regional Council (the local authority with the most prosecutions for 2014/2015, 2015/2016 and 2016/2017) for information pertaining to “[t]he names and number of defendants in each case and the number of charges filed against each defendant” and “[h]ow the charges were resolved against each of these defendants (for instance, guilty pleas before trial, guilty verdicts at trial, withdrawn by prosecutor, acquitted or dismissed by a Judge or jury, or in progress still)” was declined.<sup>106</sup> This refusal was pursuant to s 17(f) of the Act, on the basis that a record was not held of this information and so it “cannot be made available without substantial collation or research”. On the other hand, the Council was able to provide the names of defendant(s) (once convicted), charges for which they were convicted and any penalty. This reinforces the point underlying this section that the main concern of local authorities is the end result of prosecutions, not what needs to happen to get there.

#### *IV Resolving Cases Out of Court – Chequebook Justice*

Third and finally, the reparative gloss approach impacts on how cases are resolved out of court. In particular, local authorities will sometimes not prosecute (or discontinue an extant prosecution) if the defendant has remediated the damage and/or compensated the council for its costs. This is because such arrangements allow local authorities to achieve an outcome that is as good as, or better than, they would likely have achieved in prosecuting, but without the risk.

---

<sup>105</sup> Criminal Procedure Act 2011, s 147. As the Court also acknowledged in *Canterbury Regional Council v Bathurst Coal Ltd* [2019] NZDC 14416 at [27], “[t]he amicus rightly highlights the practical difficulties that could arise with continuing a prosecution that the prosecuting agency wishes to discontinue, including tension between the judiciary and the executive (the latter being empowered to commence and continue with a prosecution).”

<sup>106</sup> Letter from Otago Regional Council to Mark Wright regarding Local Government Official Information and Meetings Act 1987 (LGOIMA) Request (24 June 2019).

However, the problem with this, from a criminal law perspective, is that sometimes the offending is too serious to warrant diversion. Further, it raises issues of equality of treatment, both within a region (some offenders being offered diversion and others not) and between regions (as local authorities differ in terms of the diversionary schemes, if any, they operate). Finally, diversion will be unlawful if the defendant is paying a sum of money to “stifle the prosecution”.<sup>107</sup> Local authorities are, however, able to act in this way because there are no checks on out of court diversion, in-court diversionary schemes have been permitted by the courts and the reporting of diversion is controlled by local authorities.

### *A Outcomes*

As just noted, the third outcome of the reparative gloss approach is that local authorities will sometimes not prosecute (or discontinue an extant prosecution) if the defendant has remediated the damage caused and/or compensated the council for its costs. This is typically called “diversion”, after the schemes run by the Police,<sup>108</sup> and it can take a variety of forms, ranging from informal to formal. However, regardless of the formality of the process, the idea behind the schemes remains the same – in return for the offender doing one or more things to “make up for” the offending, it will not receive a conviction or other penalty. It is important to be clear that what is being discussed here is, strictly speaking, separate to the compliance approach to enforcement (discussed in Chapter 5). In the matters discussed here, the local authority believes the case to be appropriate for prosecution, but that the same or better outcome can be achieved directly with the offender, rather than by way of a criminal conviction being entered and penalty being imposed by the courts. On the other hand, in the matters discussed in Chapter 5 the local authority is using lower level measures because it does not believe the case to be appropriate for prosecution. However, there will be cases that fall between the two, such as where a local authority believes a case is appropriate for prosecution but, following discussions with the offender, instead agrees to use a lower level measure (which the offender will not contest).<sup>109</sup>

---

<sup>107</sup> *Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447 at [101].

<sup>108</sup> See NZ Police *Police Adult Diversion Scheme* (2013).

<sup>109</sup> A possible example of this is the Hawkes Bay Regional Council’s prosecution of the Hastings District Council for breaching resource consent conditions relating to the taking and use of water, which followed the Havelock North water contamination event in August 2016. The charges were laid in November 2016, but in December of that year the parties issued a joint press release advising that the Regional Council was withdrawing the charges and issuing two infringement notices instead, which would not be challenged by the District Council (Hawkes Bay Regional Council and Hastings District Council “HBRC agrees to withdraw prosecution of HDC” (press release, 12 December 2016). The District Council had previously been publicly critical of the decision to charge it (Marty Sharpe “Charges against Hastings District Council after Havelock



Informal diversion is entirely outside of the court process and, at its simplest, involves the offender fixing the issue it has caused in return for the local authority not taking the matter any further. By its very nature, it is not set out in any enforcement policy and Brown's survey of local authorities found that, while only four councils replied that they had a "bespoke alternative dispute resolution process", "many officers interviewed said that informal reparation is very much more common than those figures indicate".<sup>110</sup> In addition to this simple arrangement, another type of informal diversion Brown refers to is "retrospective consents", which "are commonly given to activities already completed and they may also allow for the extension of previously unlawful activities."<sup>111</sup> Either way, the council avoids the costs associated with the prosecution process, but achieves the outcome it desired of fixing the issue and/or regularising the position going forward.

Informal diversion does not even need to be referred to as such, in that it could simply be the defendant fixing the problem and claiming it has a defence, giving the local authority grounds to take no further action. This is one way of viewing Environment Southland's response to an oil spill by Southern Transport Ltd in 2015.<sup>112</sup> In this matter, a Southern Transport truck carrying approximately 23,700 litres of transformer oil crashed off the road, spilling its contents into Sharks Tooth Creek, a tributary of the Makarewa River. The company took full responsibility for the clean-up and spent in excess of \$250,000 in clean-up costs. No enforcement action was taken by Environment Southland, on the basis that it considered Southern Transport had a statutory defence. However, when one considers the memo prepared by the Environment Southland Enforcement Officer as to whether enforcement action should be taken, it simply states, after recording the terms of s 341(2)(b), that:<sup>113</sup>

In this case [it] would be hard to argue that the truck accident was foreseeable. It was clearly an accident.

The effects of the event were also mitigated by Southern Transport Co Ltd, which started as soon as possible after the accident. The clean-up operation ran for a number of weeks and involved a number of staff. Clean-up costs covered by the company included earthmoving equipment, a large number of booms and other consumables, sucker trucks, and staff time.

---

North gastro investigation" *Stuff* (online ed, Wellington, 18 November 2016) and spent \$271,000 in preparing for the prosecution (Marty Sharpe "Canned prosecution cost Hastings ratepayers \$271,000" *Stuff* (online ed, Wellington, 26 January 2017).

<sup>110</sup> Brown, above n 10, at 53.

<sup>111</sup> At 53-54.

<sup>112</sup> See Evan Harding "Environment Southland didn't tell public of 23,700-litre oil spill" *Stuff* (online ed, Wellington, 10 July 2017); Environment Southland "Public statement: 2015 Oil spill response" (press release, 14 July 2017).

<sup>113</sup> Email from Environment Southland to Mark Wright regarding LGOIMA request (13 December 2018).

Considering the available evidence I feel that Southern Transport Co Ltd have met the test for a valid defence under section 341. For this reason any enforcement action would not be appropriate.

This deals with clauses (i) and (ii) of the defence in s 341(2)(b), but not the prerequisite that “the action or event to which the prosecution relates was due to an event beyond the control of the defendant”. Indeed, there appears to have been no investigation into the cause of the accident at all. The point is not so much whether the defence was in fact available – there may well have been evidence that this prerequisite could have been proved by Southern Transport – but rather that there is much incentive for the local authority, in a situation where the putative defendant has fully remediated the damage and the council has spent little in the way of investigation costs,<sup>114</sup> to simply decide the matter is at an end once the prospect of a defence is raised.

Before moving on to formal diversion schemes, there is a “halfway house” option whereby a prosecution is brought and the defendant pleads guilty, but before sentencing the defendant agrees to do certain things – generally, repair any damage and make a contribution to the local authority’s costs – and in return the local authority agrees not to oppose the defendant’s application for a discharge without conviction. Such arrangements also happen from time to time, as *Bay of Plenty Regional Council v Withington* shows.<sup>115</sup> In this case, after the defendant pleaded guilty a restorative justice conference was held, during which the defendant agreed to apologise, to pay for planting native species in the affected area and to pay half the costs incurred by the Council’s prosecution, and in return the local authority would support his application for a discharge without conviction.<sup>116</sup> While such arrangements do not always work out for the defendant – the sentencing Judge in this case did not consider a discharge without conviction to be an appropriate outcome, and instead convicted and discharged the defendant (because his contribution to the Council’s costs was approximately the same as 90% of the fine that would have been imposed)<sup>117</sup> – what can be observed is that the local authority was using an out of court process to get the outcome it was expecting from prosecuting. Put another way, the damage was being remediated and the Council received a contribution to its costs equivalent to what it would have received from

---

<sup>114</sup> The costs incurred by Environment Southland amounted to \$1,248: Email from Environment Southland to Mark Wright regarding Local Government Official Information and Meetings Act Request (13 November 2018).

<sup>115</sup> *Bay of Plenty Regional Council v Withington* [2018] NZDC 1800.

<sup>116</sup> At [37]–[38].

<sup>117</sup> At [87]. An appeal against sentence was dismissed: *Withington v Bay of Plenty Regional Council* [2018] NZHC 1237.

(90% of) the fine, but without the risk that the Judge may order a lower level of fine or that the defendant may not pay the fine.

In terms of formal diversion, such schemes are practised by various local authorities in New Zealand, including Environment Canterbury,<sup>118</sup> Environment Southland<sup>119</sup> and the West Coast Regional Council.<sup>120</sup> The schemes typically involve the council commencing a prosecution, but then adjourning it while a set of conditions, such as the remediation of the damage caused, are negotiated with and then completed by the defendant. Unlike the “halfway house” arrangement referred to earlier, if the offender completes these to the satisfaction of the local authority then it will seek leave to withdraw the charges, rather than the defendant having to rely on successfully applying for a discharge without conviction. There is no statutory basis for these arrangements, as s 148 of the Criminal Procedure Act 2011 only applies to programmes “conducted in relation to any public prosecution”; rather, they are a creation of the local authorities.

Such schemes will obviously come at a greater cost to local authorities than informal diversion, in that charges must be filed, disclosure provided and various appearances in court made, but councils recognise this by typically requiring, as a condition, the payment of the costs of not only remediation, but also of the investigation and prosecution. For instance, Environment Canterbury’s “Guidelines for implementing Alternative Environmental Justice” note under the heading “5.4 Setting Appropriate Conditions” that:<sup>121</sup>

As costs and fines are both consequences of a conviction, it is similarly appropriate that the issue of the costs of remediating, investigating and prosecuting offences be a part of the [Alternative Environmental Justice] process. Unless the defendant has restricted financial capacity, it is expected that the defendant should make a significant contribution to the costs of remediation, the investigation and/or prosecution.

The Guidelines then go on, in even more forceful terms, to state:<sup>122</sup>

*It is appropriate that all costs of the offending be covered by the offender and not the rate-paying community.* This has been referred to by the Courts as a “polluter pays” approach. This is because persons who seek to comply with their duties under the Act are subject to full cost recovery. Therefore *a person who seeks to avoid compliance should similarly be subject to full cost recovery.* It is considered that offenders who

<sup>118</sup> Environment Canterbury *Guidelines for implementing Alternative Environmental Justice* (2012).

<sup>119</sup> Environment Southland, above n 45.

<sup>120</sup> West Coast Regional Council *Enforcement Policy* (2013).

<sup>121</sup> Environment Canterbury, above n 118, at 8-9. Contrast this with the Police diversion scheme, which never involves conditions that require a payment to the Police for investigation and prosecution costs: see NZ Police, above n 108.

<sup>122</sup> Environment Canterbury, above n 118, at 9 (emphasis added).

have avoided the costs of compliance should pay the Council's reasonable costs associated with the non-compliance, such as the reasonable costs of the investigation and/or the reasonable costs of a prosecution. If costs are not agreed it is Environment Canterbury's discretion to seek costs before a District Court Judge.

Similarly, the West Coast Regional Council's policy notes that, under the heading "Eligibility Criteria for Alternative Environmental Justice pathway", one of the criteria is "[a]ll Council investigation costs must be met by the offender".<sup>123</sup> The Policy then goes on to state:<sup>124</sup>

#### **Meeting the Council's Costs**

The defendant will be liable for all the costs associated with the process. This includes the investigation and legal costs leading to the decision to undertake Alternative Environmental Justice and the costs associated with the Council attending the Conference (including the independent facilitator costs).

If one of the parties withdraws from the process then the defendant cannot be held liable for costs. However if this was to occur then Council would incorporate these costs into any sentencing submissions during the court process that follows.

What can be observed is that, in a similar vein to the "halfway house" option referred to above, such arrangements remove the risk for the local authority. Rather than the "lottery" as to whether remediation will be undertaken and whether (90% of) the fines imposed will meet the council's costs (and that these will be paid), formal diversion schemes allow the local authority the (relative) certainty of knowing that the remediation costs, and its investigation and prosecution costs, will be covered. Indeed, in *Canterbury Regional Council v Bathurst Coal Ltd*, a case where the prosecutor was seeking leave to withdraw all the charges filed on the basis that the defendant had been through its diversionary process, the Judge referred to a report from Restorative Justice Services that "contains a statement from a Regional Council employee recording that the outcome of the Scheme 'typically involves a financial contribution that is three times what a fine would be'".<sup>125</sup>

#### **B Problems**

It is important to recognise that, for the council and the defendant (or putative defendant), there is much to gain from diversionary schemes. In particular, such arrangements may assist with getting any damage repaired promptly and keep costs – for both parties – to a minimum. Further, the Ministry for the Environment has noted that "Environment Canterbury reports that no party who has taken part in Alternative Environmental Justice has reoffended and the

<sup>123</sup> West Coast Regional Council, above n 120, at 17.

<sup>124</sup> At 18.

<sup>125</sup> *Canterbury Regional Council v Bathurst Coal Ltd*, above n 105, at [14].

feedback on the process has been positive.”<sup>126</sup> However, from a broader perspective, these arrangements can be problematic.

First, as Ashworth and Zedner note, the “diversion of cases above a certain level of seriousness should be opposed, insofar as it permits a private negotiation between defendant and state to trump the larger public interest in proportionate penal responses and replaces public prosecution with an individualized, private form of justice or ‘contractual governance’.”<sup>127</sup> This is a major problem with RMA diversion, it is suggested, because low-level measures are already available to local authorities and used heavily.<sup>128</sup> As such, the cases considered for diversion will already have crossed a “seriousness threshold”.<sup>129</sup>

Local authorities therefore try to justify such schemes in another way. For instance, Environment Canterbury’s guidelines begin by noting that “[m]any environmental offences do not appear to be the result of deliberate or deceptive activities”, but that “significant and permanent consequences can follow from environmental offending, even though it may have been inadvertent”, and that it is “with this in mind that [Alternative Environmental Justice] has been developed to fill an identified gap in the ‘regulatory toolbox’ where an infringement fine does not provide an adequate deterrent, but a prosecution may be overly harsh”.<sup>130</sup> Similarly, the West Coast Regional Council policy states:<sup>131</sup>

Experience has shown that, in some cases, environmental offending is the result of ignorance of the rules or lack of care rather than outright deceptiveness or deliberate actions. Sometimes in these cases the environmental impact is deemed to be more serious than what would warrant an infringement or abatement notice. However, exposing the offender to the full prosecution process may be too harsh. It is in these ‘grey areas’ where the Alternative Environmental Justice method could come into play.

However, the first point to note is that Parliament has explicitly stated that whether or not a person intended to offend is irrelevant to liability.<sup>132</sup> Rather, this can be – and is – taken into

---

<sup>126</sup> Ministry for the Environment, above n , at 99. There has, however, been repeat offending in other regions, and as the diversionary scheme did not result in a conviction this was not able to be used to uplift the starting point: see *West Coast Regional Council v Johnson Brothers Transport (2006) Ltd* [2018] NZDC 22057.

<sup>127</sup> Andrew Ashworth and Lucia Zedner “Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions” (2008) 2 Criminal Law and Philosophy 21 at 26, citing Adam Crawford “‘Contractual Governance’ of Deviant Behaviour” (2003) 30(4) Journal of Law and Society 479.

<sup>128</sup> See the discussion in Chapter 5.

<sup>129</sup> Contrast this with Police diversion schemes, which are for offences that are “not serious”: see NZ Police, above n 108.

<sup>130</sup> Environment Canterbury, above n 118, at 1.

<sup>131</sup> West Coast Regional Council, above n 120, at 17.

<sup>132</sup> RMA, s 342(1).

account at sentencing.<sup>133</sup> But more fundamentally, it could be questioned whether it is the role of a local authority to create, what is essentially, its own sanctioning regime, whereby the local authority “imposes” a more serious penalty than the infringement notice, and even potentially an equal or more serious penalty than arising out of a prosecution (albeit without the conviction), without the protections provided to defendants by being part of a court process.<sup>134</sup> While the arrangements technically come within a prosecution, and so appear to have supervision from the courts, this oversight (such as it is) may provide a false confidence for defendants, as the Court has no role in setting the conditions or determining if they have been fulfilled. Indeed, the local authorities use the courts more as a threat, than as a protection, as shown by the references in both the guidelines of Environment Canterbury and the West Coast Regional Council to seeking costs from the Court if these cannot be agreed with the defendant (in the case of the former) or if the defendant withdraws from the process (in the case of the latter).<sup>135</sup> Ultimately, Parliament has provided local authorities with infringement notices, for less serious offending that requires a punitive response, and criminal offences, for more serious offending that requires a punitive response. If an intermediate sanction is required, then this is a matter for Parliament.<sup>136</sup>

Related to this, another reason often given for having a diversionary scheme is that the “interests of justice may not justify the recording of a conviction against the defendant.”<sup>137</sup> However, there is already a way that guilty defendants can avoid a conviction, by applying to the Court for a discharge without conviction if the consequences of such would be out of all proportion to the gravity of the offence.<sup>138</sup> Therefore, the local authority appears to be usurping the role of the courts in making a decision as to whether or not a conviction is required. The matter might be different if a diversionary scheme was used where the defendant accepted responsibility for what happened and agreed to make things right, but there was a reasonable doubt as to whether the defendant had committed an offence.<sup>139</sup>

---

<sup>133</sup> See the discussion in Chapter 5.

<sup>134</sup> See, in a similar vein, the concerns about Community Justice Panels in Ronald Young “Has New Zealand's criminal justice system been compromised?” (Harkness Henry Lecture, Waikato University, Hamilton, 7 September 2016) at 14-15 and Sian Elias, Chief Justice of New Zealand “Managing Criminal Justice” (address given at the Criminal Bar Association Conference, Auckland, 5 August 2017) at 10-12.

<sup>135</sup> This use of the courts as a threat is returned to below.

<sup>136</sup> An example of an intermediate sanction is a pecuniary penalty: as to which, see Law Commission *Civil Pecuniary Penalties* (NZLC IP33, 2012); Law Commission *Pecuniary Penalties: guidance for legislative design* (NZLC R133, 2014).

<sup>137</sup> Environment Canterbury, above n 118, at 4.

<sup>138</sup> Sentencing Act 2002, ss 106 and 107.

<sup>139</sup> This is essentially the purpose of an enforceable undertaking: see, for example, sections 123 to 129 of the Health and Safety at Work Act 2015, and in particular s 123(2) and (3) which provide, respectively, that “[t]he

However, this is not the case, as it is typically a requirement of formal diversionary schemes that the defendant admits the offending.<sup>140</sup>

The next problem with diversionary schemes is that they have the potential to treat people unequally, in (at least) two ways. First, recall the Southern Transport matter referred to in the subsection above, whereby the putative defendant fully remediated the damage and the Council had spent little in the way of investigation costs, and the Council accepted it was an accident (apparently without any further investigation) and that the s 341(2)(b) defence applied. Yet it is frequently the case that other offending, which is prosecuted, arises out of an “accident”. For instance, had this been a significant “accidental” dairy farm effluent discharge that reached water, it is highly likely the local authority would have investigated the cause of the accident (for instance, had the condition of the irrigator that broke and discharged the effluent recently been checked?) even if the farm owner had remediated the damage. It also highlights the problem with the process used for deciding whether a case goes to prosecution, as discussed in the first section of this chapter. The Southern Transport incident was clearly serious, given the quantity of oil spilled and the receiving environment, but it never even made it to an enforcement panel, let alone legal review, because at an early stage it was decided by an Enforcement Officer that there was an available defence.

The second way that people are being treated unequally is between regions, as not every local authority runs a formal diversionary scheme.<sup>141</sup> As such, two people may commit similar offences in neighbouring areas, yet only one will receive a conviction.<sup>142</sup> This cannot even be put down to regional differences. The local authorities that run such schemes are not saying that they are prioritising the enforcement of certain activities over others, they are saying that, across-the-board, sometimes prosecutable offending in their region does not deserve a conviction.<sup>143</sup>

Perhaps the most fundamental problem with RMA diversionary schemes, however, is that they may be unlawful. In *Osborne v Worksafe New Zealand*, the Supreme Court considered

---

regulator must not accept an enforceable undertaking under subsection (1) if the regulator believes that the contravention or alleged contravention would amount to an offence against section 47” and “[t]he giving of an enforceable undertaking does not constitute an admission of guilt by the person giving it in relation to the contravention or alleged contravention to which the undertaking relates.”

<sup>140</sup> See, for example, *Environment Canterbury*, above n 118, at 4.

<sup>141</sup> See generally *Elias*, above n 134, at 12.

<sup>142</sup> *Canterbury Regional Council v Bathurst Coal Ltd*, above n 105, at [43].

<sup>143</sup> For a discussion on issues with national legislation and local implementation, see William J Stuntz *The collapse of American criminal justice* (Harvard University Press, Cambridge, 2011) at 158-161.

the circumstances in which the payment of a sum of money in return for a prosecutor not commencing, or commencing and withdrawing, a prosecution would amount to an “unlawful bargain”.<sup>144</sup> This case arose out of the death of 29 men following explosions at the Pike River coal mine on 19 November 2010. Twelve charges had been laid under the Health and Safety in Employment Act 1992 against a director and chief executive officer of Pike River Coal Ltd. However, Worksafe New Zealand ultimately offered no evidence on the charges after the defendant agreed to make a payment into Court of \$3.41 million, such funds to be used in satisfaction of an order for reparation that had been made earlier against Pike River Coal Ltd (and for which no payment had ever been made, given that company had gone into receivership). Family members of two of the men who died in the Pike River disaster applied for judicial review of the decision by Worksafe New Zealand to offer no evidence on the charges.<sup>145</sup> After being unsuccessful in the High Court<sup>146</sup> and Court of Appeal,<sup>147</sup> they succeeded in the Supreme Court.

The Chief Justice commenced her reasons by stating the principle, not in contention, that “[i]t is contrary to the public interest and unlawful for an arrangement to be made that a prosecution will not be brought or maintained on the condition that a sum of money is paid.”<sup>148</sup> The critical question was “whether the Court of Appeal was right to hold that the conditional arrangement made by Mr Whittall to pay the reparations ordered against Pike River Coal was not an agreement to prevent the prosecution but an offer of voluntary payment which WorkSafe was entitled to take into account in making its decision about prosecution”?<sup>149</sup> Ultimately, the Court decided unanimously that the “conditional payment was a bargain to stifle the prosecution”.<sup>150</sup>

The relevance of this is that, as noted above, it is typically the case that, as a condition of (at least) the formal diversionary schemes, the offender must contribute, in part or whole, towards not only any remediation costs, but also the investigation and prosecution costs of the local authority. Accordingly, where these costs are the main part of the resolution between the council and the defendant, there is a risk that the arrangement will fall foul of the

---

<sup>144</sup> *Osborne v Worksafe New Zealand*, above n 107.

<sup>145</sup> At an earlier stage in proceedings, the applicants had also judicially reviewed the decision of the District Court to dismiss the charges, but that issue was no longer live by the time the case reached the Supreme Court.

<sup>146</sup> *Osborne v Worksafe New Zealand* [2015] NZHC 2991, [2016] 2 NZLR 485.

<sup>147</sup> *Osborne v Worksafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513.

<sup>148</sup> *Osborne v Worksafe New Zealand*, above n 107, at [1].

<sup>149</sup> At [25].

<sup>150</sup> At [101].



test set out in *Osborne v Worksafe New Zealand*. Put another way, is the local authority only withdrawing the charges because the offender is paying to remediate the damage and/or to reimburse the council for its costs?

It would appear that local authorities are conscious of, and have attempted to insulate themselves from, such a risk, by stating that they are not to benefit from the arrangement. For instance, after discussing factors such as proportionality, achievability/timeframe and rehabilitation, Environment Canterbury's Guidelines then state:<sup>151</sup>

**No Benefit to Environment Canterbury:** other than the recovery of actual and reasonable costs of the remediation, investigation and prosecution (which have already been incurred), no condition set as a part of an AEJ conference may result in either a direct or indirect financial benefit to Environment Canterbury.

The problem with this is that, in a "normal" prosecution these costs would not typically be recoverable, other than to the limited extent provided in the Costs in Criminal Cases Act 1967 and the Costs in Criminal Cases Regulations 1987. Therefore, the payment of actual and reasonable costs of (at least) investigation and prosecution is much more than a council would generally expect to receive from a prosecution and they are benefitting in this way. Simply stating otherwise cannot change this fact.

What the "no benefit" condition is impliedly referring to, therefore, is likely to be s 342 of the RMA, which provides that (at least) 90% of the fine imposed is paid to the local authority that commenced the prosecution. This is made clearer in the Environment Canterbury Guidelines, after a discussion on other matters such as admission of offending and remorse, in the passages quoted in the previous subsection regarding the requirement for the payment of costs. In particular, the statement is made that "[a]s costs and fines are both consequences of a conviction, it is similarly appropriate that the issue of the costs of remediating, investigating and prosecuting offences be a part of the [Alternative Environmental Justice] process", and it culminates with the comment that "[i]t is appropriate that all costs of the offending be covered by the offender and not the rate-paying community".<sup>152</sup>

However, as noted earlier, fines in a prosecution are not related to costs,<sup>153</sup> and this is for good reason. There is no necessary relationship between the costs incurred by a local authority and the chief determinants of the fine, namely the seriousness of the offence and the

---

<sup>151</sup> Environment Canterbury, above n 118, at 8.

<sup>152</sup> At 8-9.

<sup>153</sup> *Bay of Plenty Regional Council v Merrie*, above n 1, at [77].

culpability of the defendant.<sup>154</sup> A defendant might be caught “red-handed” intentionally dumping seriously harmful contaminants into a protected waterway and be willing to plead guilty quickly, meaning the local authority should incur relatively little expense. Alternatively, a defendant might commit a more minor “technical” offence and go to great lengths to obstruct a prosecution, putting the local authority to huge cost. The diversionary arrangements, therefore, may well be of great benefit to the prosecutor, as they remove all of the risk that (90% of) the fine will not cover the local authority’s costs.

This is further complicated by the references in the Environment Canterbury Guidelines, at various points, to “a significant contribution”, “all costs of the offending”, “actual and reasonable costs” and “reasonable costs”. The obvious point is that these are all different, but each individual term also has issues. For instance, “all costs of the offending” will vary greatly depending on whether the local authority has used in-house legal representation or engaged a private law firm or a barrister.<sup>155</sup> Further, it is unclear what the “reasonable” costs of the investigation and the “reasonable” costs of a prosecution are, as there is no mention as to how these would be calculated or whether a defendant can challenge the local authority’s assessment of these.

Compounding it all is the veiled threat, in the final sentence, that if the defendant does not agree to Environment Canterbury’s assessment then the Council can apply for costs to be awarded by a District Court Judge. However, the basis on which they would do this is unclear. Section 4(1) of the Costs in Criminal Cases Act 1967 provides only for costs on conviction, and it is typically the case with formal diversionary schemes that there is that no conviction entered. Even if a conviction of some sort was entered (which would seem to defeat the point of the process), any costs award is unlikely to be greater than “scale”, and therefore much less than “actual” or what the local authority would consider “reasonable”.<sup>156</sup> Similarly, it is difficult to see how the West Coast Regional Council could enforce its threat that “[i]f one of the parties withdraws from the process ... then Council would incorporate these costs into any sentencing submissions during the court process that follows.” As noted earlier, the Courts have stated that the costs incurred by the prosecutor are irrelevant to the size of the fine, and it is difficult to see how the withdrawal by the defendant amounts to

---

<sup>154</sup> For a discussion of these “chief determinants”, see Chapter 5.

<sup>155</sup> This is discussed further in Chapter 7.

<sup>156</sup> See the discussion in Chapter 5 on scale costs.

“special difficulty, complexity, or importance of the case”,<sup>157</sup> justifying an award of costs under the Costs in Criminal Cases Act 1967 that is above scale.

Although formal diversionary schemes come within a prosecution, as opposed to being an arrangement directly between the local authority and the offender, this will not prevent them from being declared unlawful. As the Supreme Court in *Osborne v Worksafe New Zealand* observed, it is “immaterial” that, as part of the arrangement, a Judge has agreed to the prosecutor withdrawing the charges.<sup>158</sup> Further, it makes no difference that, as highlighted in the first section of this chapter, RMA prosecutions are not ‘public prosecutions’ like the prosecution was in *Osborne v Worksafe New Zealand*.<sup>159</sup> This is because the jurisprudence on unlawful bargains arose out of private prosecutions,<sup>160</sup> and, in any event, local authorities are clearly performing a “public” function in prosecuting offenders for breaching the RMA.<sup>161</sup>

The rationale of formal diversionary schemes, and the potential problems, is perhaps best seen by an example. In 2018, the West Coast Regional Council prosecuted Elect Mining Limited for causing a slip that contaminated a public water supply, which led to Ross residents being on water restrictions for more than two months after silt and clay dirtied the water and clogged water treatment filters.<sup>162</sup> However, the charges were ultimately withdrawn by the prosecutor after the defendant agreed to pay a total of \$105,000, which included \$15,000 to the Ross community for use in a community project, \$70,000 to the District Council for costs to the water supply system, \$14,767 to the regional council for investigation costs and \$5,232 to cover Department of Conservation costs. A representative from the Council considered this was a “good outcome for the community” and was quoted as saying that “the payment being made by Elect through this process is likely to outweigh any fine that may have been imposed and will also directly benefit the Ross community.” This is undoubtedly the case. However, this was clearly also serious offending, arguably

---

<sup>157</sup> Costs in Criminal Cases Act 1967, s 13(3).

<sup>158</sup> *Osborne v Worksafe New Zealand*, above n 107, at [71], citing *Keir v Leeman* (1846) 9 QB 371, 115 ER 1315 (Exch Ch).

<sup>159</sup> The classification of prosecutions is returned to in Chapter 7.

<sup>160</sup> See, for instance, *The Bhowanipur Banking Corp Ltd v Dasi* (1941) 74 Calcutta Law Journal 408 (PC).

<sup>161</sup> See Gary Slapper *Organisational Prosecutions* (Routledge, London, 2018) at 36; KW Lidstone, Russell Hogg and Frank Sutcliffe *Prosecutions by private individuals and non-police agencies* (Royal Commission on Criminal Procedure (UK), No 10, 1980). It can also be noted that *Osborne v Worksafe New Zealand*, above n 107, has been applied in the RMA case of *Waikato Regional Council v Fulton Hogan Ltd*, above n 61, in the context of an application for a discharge without conviction.

<sup>162</sup> See Joanne Carroll “Mining company avoids court with six figure slip settlement” *Stuff* (online ed, Wellington, 31 October 2018).

deserving of a public hearing in court and censure by way of a conviction if proven. Further, it is hard to imagine that, had the defendant not been in a position to pay this amount of money, the charges would have been withdrawn. As such, the inescapable conclusion is that the money was paid to “stifle the prosecution”, yet rather than being concerned about the arrangement, as Worksafe New Zealand was in *Osborne v Worksafe New Zealand*,<sup>163</sup> the West Coast Regional Council actively publicised it.

### *C How Can This Happen?*

That informal diversion takes place is easily explained. As noted in Chapter 5, for many RMA offences there is no victim, meaning that there is no one that the local authority needs to explain its actions to at the time and it is unlikely to be referred to in any compliance, monitoring and enforcement report. Further, as discussed in the first section of this chapter, there is no one auditing the cases that do not go to prosecution, meaning that enforcement officers can quickly and quietly resolve cases. If the public becomes aware of such resolutions then this is typically by chance – for instance, the outcome of the Southern Transport oil spill only came to light because someone raised the issue at a public meeting<sup>164</sup> – and even when it does get raised it is often far too late for anything practically to be done about it.<sup>165</sup>

The next category of diversion was the “halfway house”, such as where a local authority agrees not to oppose an application for a discharge without conviction in return for the defendant doing certain things. As noted above, this is sometimes stopped by the courts.<sup>166</sup> However, on other occasions the courts have even tried to facilitate a similar sort of resolution. For instance, in *Auckland Council v Liu* a pretrial hearing was held in relation to some of the charges brought by the prosecution.<sup>167</sup> After dismissing one set of charges, the Court stated:<sup>168</sup>

[68] In relation to the charges under the [Proposed Auckland Unitary Plan (PAUP)] remaining and under the Operative Plan, although I have significant doubts as to whether the earthworks charges can be sustained, no ruling has been sought from the Court. In any event, as I understand it the applicant is currently finalising an

<sup>163</sup> See, for instance, the discussions that took place internally at Worksafe New Zealand, as noted in *Osborne v Worksafe New Zealand*, above n 107, at [52]-[56].

<sup>164</sup> As Environment Southland pointed out, there was an article in the Otago Daily Times on the day the crash happened (Shawn McAvinue “Oil spills after truck rolls in Southland” *Otago Daily Times* (online ed, Dunedin, 30 October 2015), but this did not detail how the matter was (subsequently) resolved with Southern Transport.

<sup>165</sup> See the discussion on limitation periods in Chapter 5.

<sup>166</sup> See *Bay of Plenty Regional Council v Withington*, above n 115.

<sup>167</sup> *Auckland Council v Liu* [2016] NZDC 14243.

<sup>168</sup> At [68]-[69] (emphasis added).

application for resource consent, which will include remediation, and it seems to me that I should allow this process to finalise, as well as the PAUP decisions process of the PAUP to be finalised.

[69] At this stage I agree with Mr Savage that in light of the primary decisions of the Court, the prosecutor should reconsider whether or not the remaining charges can be resolved in an alternative way without the need to hear these prosecutions. In that regard *it is likely that the Court would view a resolution of the issue by the granting of a resource consent and conditions thereto as akin to a restorative justice process in the event that the Council elected to seek leave to withdraw the charges.*

Although the Judge went on to state that “there may be other factors relating to these remaining charges which have not been considered by the Court at this preliminary basis and may support the matter proceeding to trial”,<sup>169</sup> this shows that the courts are willing to facilitate the “settlement” of prosecutions out of court. Further, it only encourages local authorities to do this without involving the courts at all, such as with the “retrospective resource consent” referred to in the first subsection.

Formal diversionary schemes have been allowed to proceed, to an extent, because the Ministry for the Environment has not taken a position on them. For instance, in its 2016 report on Compliance, Monitoring and Enforcement the Ministry simply refers to the use of alternative resolution schemes without comment (although it does so after a paragraph explaining the benefits in many cases of prosecution beyond the community for which the council is responsible).<sup>170</sup> Then in its more recent Guidelines on Compliance, Monitoring and Enforcement, the Ministry records the benefits of such schemes that have been reported to it, without suggesting they are, or are not, appropriate.<sup>171</sup>

However, the main reason that such schemes have been able to proceed is because they have, historically, been allowed to by the courts. Given these schemes rely on charges being filed, adjournments being granted and leave being given to withdraw the charges, the courts have great oversight powers. Yet, for the most part, there seems to have been minimal intervention (at least recorded publicly in sentencing decisions or minutes), with a number of cases going through the diversionary processes each year, seemingly without question.<sup>172</sup>

---

<sup>169</sup> At [70]. As it transpired, the matter proceeded to hearing on two charges against each of the three defendants and the defendants were each found guilty on one of these charges (*Auckland Council v Liu* [2017] NZDC 10864) and sentenced to a total of \$9,800 in fines (*Auckland Council v Liu* [2017] NZDC 22882). An appeal against conviction and sentence was dismissed (*Liu v Auckland Council* [2018] NZHC 1238).

<sup>170</sup> Ministry for the Environment, above n 63, at 26.

<sup>171</sup> Ministry for the Environment, above n 67, at 99.

<sup>172</sup> There are signs, though, that this may be changing. For instance, in the recent case of *Canterbury Regional Council v Bathurst Coal Ltd*, above n 105, the prosecutor sought leave to withdraw the charges on the basis that (at [3]) the defendant had participated in a formal diversionary scheme, which had resulted in it agreeing to

Finally, there is limited public involvement in, or awareness of, formal diversionary schemes. In terms of public involvement, as in Police schemes victims are included in the process of determining whether diversion will be offered to the offender.<sup>173</sup> However, as noted above, it is often the case with RMA offending that no person or entity is directly affected. This can be observed by the comment frequently made by sentencing Judges that s 24A of the Sentencing Act 2002, which makes an adjournment for an inquiry into restorative justice mandatory if, among other things, there are “1 or more victims of the offence”,<sup>174</sup> is not applicable.<sup>175</sup> Given “Public Opinion/Community Views” are considered to be irrelevant to the decision whether or not to make an offer of diversion, the local authority is able to make the decision to offer diversion largely on its own.<sup>176</sup>

In terms of public awareness, if a formal diversionary arrangement is allowed then there will typically be no Court decision issued. Indeed, unless the local authority reports on what has happened, then the public will not know that it has taken place or even who the defendant was. For instance, while the Otago Regional Council advised, pursuant to a Local Government and Official Information and Meetings Act 1987 request, that it had granted 10 diversions in the four financial years 2015 to 2018, it withheld the names of the parties under s 6(a) and s 7(2)(a) of the Act.<sup>177</sup> Such grounds are (respectively) that the making available of that information would be likely to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial, and withholding of the information is necessary to protect the privacy of natural persons, including that of deceased natural persons. In what way it would likely prejudice the

---

protect, by fencing and other works, a section of Bush Gully Stream. This work was not remedial, in the sense that it did not arise as a result of the offending, but was estimated to cost \$50,000 (at [15]). Judge Borthwick first observed that “[t]he court exercises oversight of a prosecutorial decision seeking leave to withdraw to ensure that the prosecutor has followed a principled and robust process” (at [25]). After noting that “there is considerable public interest in prosecuting offending under the Resource Management Act 1991”, Her Honour then noted that the prosecutor “appears to give significant weight to the anticipated penalty”, and in particular that, due to the value of the work (to be) undertaken, that no fine would likely result (at [38]). Judge Borthwick was not persuaded by this, and declined the application to withdraw the charges as she could not be satisfied that the “decision to seek leave is a principled one having followed a proper process” (at [39]). The defendant subsequently pleaded guilty and applied for a discharge without conviction, which was declined, and it was convicted and fined \$18,000: *Canterbury Regional Council v Bathurst Coal Ltd* [2019] NZDC 23872.

<sup>173</sup> Environment Canterbury, above n 118, at 4.

<sup>174</sup> Sentencing Act 2002, s 24A(1)(c).

<sup>175</sup> See, for example, *Taranaki Regional Council v Vernon* [2018] NZDC 14037 at [3].

<sup>176</sup> Environment Canterbury, above n 118, at 5. This is on the basis that “[t]he potential number and diversity of community interests and opinions held mean that it is not realistic for a decision-maker to assess that factor objectively. Rather, it is anticipated that the views of the public, would be factored in to an assessment of the public interest when considering what conditions agreed to at a conference are appropriate.”

<sup>177</sup> Email from Otago Regional Council to Mark Wright regarding Local Government Official Information and Meetings Act 1987 (LGOIMA) Request (5 September 2019).

maintenance of the law and why it is necessary to protect the privacy of natural persons was not made clear, but the point is that local authorities are treating such arrangements like confidential civil “settlement agreements”, rather than a matter of public record or interest.

## *V Conclusion*

In this chapter, it was argued that the reparative gloss approach has led to local authorities avoiding s 9 cases, resolving prosecutions by plea bargains that contain guilty pleas, agreed summaries of facts and corporate defendants, and diverting other prosecutable cases away from the criminal justice system. It was also argued that there are a number of problems with the way local authorities are acting to achieve these outcomes – there is, among other things, unequal treatment of regulatees, unprincipled actions in resolving cases in court and certain out of court resolutions may be unlawful. As such, the reparative gloss approach, and so the way the offences are used by local authorities, is inappropriate.

It is important to be clear that there is no suggestion that local authorities are acting inappropriately for nefarious reasons. In fact, it is quite the opposite – they act in the way that they consider to be the best for their ratepayers, in the sense of trying to get any issues fixed (the damage repaired and non-compliance rectified) and limiting the financial burden by recovering as much of the costs they incur as they can. But this is interpreting “best” in very narrow, monetary terms, and is contrary to criminal law norms. Indeed, as the former Chief Justice of New Zealand, Sian Elias, recently observed:<sup>178</sup>

If it is to be legitimate, the great coercive power of the state in criminal justice must be must applied in a manner that is “uniform, equal, and predictable”. It must also be demonstrated in public. Such process may not be speedy and it is not likely to be cheap. I do not expect criminal justice ever was speedy or cheap. Its careful observance is however best policy for a state that aspires to live under the rule of law. We are all implicated in the move to managerial justice in criminal law. We need to be careful.

The conclusion from Chapter 5 can now be taken one step further. Not only is the approach adopted by councils distinctly “non-criminal”, it is in fact “civil”. Choosing cases where an external remedy is needed and where recovery will be the greatest (and preferably following lower level attempts to resolve the dispute first), bringing proceedings against a number of defendants and with multiple claims and then settling against “deep pockets” on a much more

---

<sup>178</sup> Elias, above n 134, at 13. The quote comes from Roscoe Pound *The development of constitutional guarantees of liberty* (Yale University Press, New Haven, 1957) at 1.

limited basis, and resolving cases out of court when the outcome will be better than would be achieved in court are all hallmarks of civil proceedings, not prosecutions.<sup>179</sup>

Yet local authorities have been able to act in this way because there have been no or inadequate checks on them. RMA cases do not come within the oversight of the Solicitor-General and the Ministry for the Environment has shown little interest in undertaking this role. Further, the actions of the local authorities have, for the most part, been condoned by the courts, who are reluctant to intervene in the exercise of prosecutorial discretion. Finally, the public is only advised of the ultimate outcomes of cases (if at all), not the process undertaken to reach the results.

However, this does not explain why local authorities consider it acceptable to act in this way. This is the topic of the next chapter, the last in the critique of the RMA's offences.

---

<sup>179</sup> Indeed, this was the conclusion of Fogarty J in *Carruthers v Otago Regional Council* [2014] NZHC 2212 at [16] that “[t]hese proceedings under the RMA are similar to civil proceedings, less so to ordinary criminal proceedings. They require experts in RMA law to argue the cases.”



## Chapter 7 – Explaining the Inappropriate Use: Form versus Substance

---

### *I Introduction*

In the previous chapter, it was argued that the way the RMA's offences are being used by local authorities is, from a criminal law perspective, inappropriate. The reparative gloss approach that has been adopted means that local authorities are avoiding s 9 cases, resolving prosecutions by plea bargains that contain guilty pleas, agreed summaries of facts and corporate defendants, and diverting other prosecutable cases away from the criminal justice system. However, there are a number of problems with the way local authorities are acting to achieve these outcomes. Among other things, there is unequal treatment of regulatees, unprincipled actions in resolving cases in court and some out of court resolutions may be unlawful.

It was also explained in Chapter 6 how local authorities have been able to adopt the reparative gloss approach. In particular, there is no oversight from the Solicitor-General and the Ministry for the Environment does not appear to be interested in adopting this role. Further, the actions of the local authorities have generally been condoned by the courts and the public is only advised of the ultimate outcomes of cases (if at all), not the process undertaken to reach the results. In short, the actions of the local authorities are essentially unchecked.

However, this does not explain why local authorities consider it acceptable to use the offences in this inappropriate manner. This is the topic of this chapter and the question is considered from a systemic perspective – are the RMA's offences, penalties and institutional arrangements driving local authorities to make prosecution decisions in a manner that is contrary to criminal law norms? If so, then this should be the first thing targeted in any reforms, instead of simply trying to change council behaviour. The discussion is divided into the creation of the RMA's enforcement provisions (section II) and the offences, penalties and institutional arrangements themselves (section III). The overall argument advanced is that local authorities are making inappropriate prosecution decisions because the RMA's offences, penalties and institutional arrangements have been prepared (or interpreted) in a manner whereby they contain few indicators of substantive criminality, and indeed look more like those associated with civil causes of action.

## *II The Creation of the RMA – Towards Easier and More Worthwhile Prosecutions*

In this section, the rationale behind the RMA's offences, penalties and institutional arrangements is considered. First, it is observed that the resource management legislation before the RMA was consistent in using criminal offences as the high-level sanction for non-compliance, but varied markedly in terms of how the provisions were drafted. Second, it is discussed how, notwithstanding these differences, the statutes were generally considered hard to enforce and that offending resulted in low penalties, and there was a view during the Resource Management Law Reform process (that preceded the drafting of the RMA) that prosecution needed to be made easier and more worthwhile. However, there was a lack of specific direction as to how this should be done or what the consequences of doing so would be. Third, the passage of the Resource Management Bill through Parliament is examined, the observation being made that these trade-offs were never discussed, the emphasis being firmly placed on making prosecution (and enforcement generally) more attractive to local authorities.

### *A Marked Variations in Previous Resource Management Legislation*

Before the RMA, there were a number of different statutes that dealt with the management of natural and physical resources in New Zealand.<sup>1</sup> It is worth briefly considering, as examples, the approaches taken to criminal enforcement in three of the main statutes – the Water and Soil Conservation Act 1967, the Clean Air Act 1972 and the Town and Country Planning Act 1977 – as this shows the different arrangements that existed when the Resource Management Law Reform process began.<sup>2</sup> It is also relevant to the analysis in section III below, as various provisions from these statutes were “cherry-picked” into the RMA.

The Water and Soil Conservation Act 1967 was:<sup>3</sup>

An Act to promote a national policy in respect of natural water, and to make better provision for the conservation, allocation, use, and quality of natural water, and for promoting soil conservation and preventing damage by flood and erosion, and for

---

<sup>1</sup> See generally Grant Hewison “The Resource Management Act 1991” in Peter Salmon and David Grinlinton (eds) *Environmental law in New Zealand* (Thomson Reuters, Wellington, 2015) 533 at 534.

<sup>2</sup> For a more detailed summary of the various enforcement regimes, see Resource Management Law Reform Core Group *Enforcement and Compliance Issues in Resource Management* (Ministry for the Environment, Working Paper 30, November 1988) at 78-93.

<sup>3</sup> Water and Soil Conservation Act 1967, long title. For a more detailed discussion of this Act, see Resource Management Law Reform Core Group *Analysis of Existing Statutes: Legal Analysis Part 3: Water and Soil Conservation Act 1967, Soil Conservation & Rivers Control Act 1941* (Ministry for the Environment, Working Paper 7, July 1988).

promoting and controlling multiple uses of natural water and the drainage of land, and for ensuring that adequate account is taken of the needs of primary and secondary industry, community water supplies, all forms of water-based recreation, fisheries, and wildlife habitats, and of the preservation and protection of the wild, scenic, and other natural characteristics of rivers, streams, and lakes

The “primary offence” provisions were contained in s 34(1).<sup>4</sup> For instance, by the time of its repeal, it was an offence to “otherwise than as authorised by or under this Act or otherwise than in accordance with an exception from the provisions of this Act”, discharge “any waste or natural water containing waste into any natural water”.<sup>5</sup> It would seem that, for the most part, these offences were of strict liability in the public welfare regulatory offence sense.<sup>6</sup> However, s 34(1)(h), which dealt with causing or permitting any “chemical, metallic, or organic wastes or any unsightly or odorous litter or refuse” to enter any water that has been classified as natural water pursuant to s 26E of the Act, required the prosecution to prove that this was done “knowingly”. Proceedings, which were typically brought by Regional Water Boards or Regional Councils, could be brought up to one year after the time when the matter arose.<sup>7</sup>

While originally the maximum penalty for these “primary offences” was a fine not exceeding \$200 (and \$10 per day for continuing offences), at the time of the Act’s repeal these penalties had been increased to \$150,000 (and \$10,000 per day).<sup>8</sup> Where the offence involved the discharge or entry of waste into natural water, the Court, in determining a fine, was to take into account any costs reasonably incurred by a body or person in disposing of the waste and restoring the natural water, and if that body or person was not a local authority or other organisation that is specifically empowered to do so by the Act, direct that the body or person receive a portion of the fine.<sup>9</sup> If a person was convicted under s 34, the Court could, in its discretion, in addition to or instead of imposing any fine cancel any “current mining privilege” held by that person.<sup>10</sup>

---

<sup>4</sup> Beyond these “primary offences”, it was also an offence to act in contravention of or fail to comply with “any provision of this Act or of any direction, notice, order, or requirement given or made pursuant to this Act”: s 34(2).

<sup>5</sup> Section 34(1)(d).

<sup>6</sup> See, for example, *Hastings City Council v Simons* [1984] 2 NZLR 502 (HC), which dealt with an offence under s 34(1)(b).

<sup>7</sup> Section 34(7).

<sup>8</sup> Section 34(3). The other breaches of the Act had a maximum penalty of \$2,000 and \$200 per day for continuing offences: see s 34(4).

<sup>9</sup> Section 34(5).

<sup>10</sup> Water and Soil Conservation Amendment Act 1971, s 33. Current mining privileges included water-race licences (s 4), dam licences (s 5), drainage-area licences (s 6), tail-race licences (s 7) and main tail-race licences (s 8).

The Clean Air Act 1972 was concerned with promoting “the conservation of the air and the abatement of the pollution thereof”.<sup>11</sup> In addition to certain specific duties, occupiers of premises were under a general duty to “adopt the best practicable means” of collecting and containing air pollutants, minimising the emission of these and rendering any air pollutant emitted harmless and inoffensive.<sup>12</sup> While originally it was only an offence against the general duty for any occupier of “industrial or trade premises” to “knowingly” contravene this duty,<sup>13</sup> these two restrictions were subsequently removed.<sup>14</sup> This offence (and indeed all offences in the Act) were then labelled “strict liability”, in that it was explicitly stated that it was not “necessary for the prosecution to prove that the defendant intended to commit an offence”.<sup>15</sup> A statutory defence was provided, which was, in essence, that the contravention was due to a mechanical failure that was not reasonably foreseeable or able to be provided against, with the contravention unable to have been prevented after the failure occurred.<sup>16</sup> The defendant had to notify the prosecutor that it intended to rely on this defence (and the facts that support its reliance) “within 7 days after the service of the summons or within such further time as the Court may allow”.<sup>17</sup>

Local authorities were under a general duty to enforce the provisions of the Act “in respect of scheduled premises within its district in relation to which it is the licensing authority and in respect of premises within its district which are not scheduled premises”.<sup>18</sup> There were special provisions relating to air pollutants emitted from premises outside their district,<sup>19</sup> and prosecutions under certain sections required the leave of the Director-General of Health.<sup>20</sup> Some of the specific duties (such as those found in ss 10 and 16 of the Act, which related to,

---

<sup>11</sup> Clean Air Act 1972, long title. For a more detailed discussion, see Resource Management Law Reform Core Group *Analysis of Existing Statutes: Legal Analysis Part 4: Clean Air Act 1972* (Ministry for the Environment, Working Paper 7, 1988).

<sup>12</sup> Section 7(1).

<sup>13</sup> Section 7(2)(a) (as enacted).

<sup>14</sup> See Clean Air Amendment Act 1982, s 3.

<sup>15</sup> Clean Air Act 1972, s 7A(1). This change apparently arose after a case in which the prosecution was unable to prove that the occupiers of scheduled premises knew of the breach of s 7: see Resource Management Law Reform Core Group, above n 11, at 5.

<sup>16</sup> In full, s 7A(2) (as inserted by s 4 of the Clean Air Amendment Act 1982) provided that:

... it shall be a good defence to any such prosecution if the defendant proves-

(a) That the contravention complained of was solely due to a mechanical failure; and

(b) That either—

(i) The failure could not reasonably have been foreseen; or

(ii) In any other case, the failure could not reasonably have been provided against; and

(c) That the contravention could not reasonably have been prevented by action taken after the failure occurred.

<sup>17</sup> Section 7A(3).

<sup>18</sup> Section 48(1).

<sup>19</sup> Section 48(2).

<sup>20</sup> Section 48(3).

respectively, the emission of dense smoke and light smoke in a clean air zone) required an officer to give notice of the breach to the occupier of the premises within 72 hours of becoming aware of it, or the defendant would have a good defence.<sup>21</sup> Charges could be brought up to one year after the matter that was the subject of the offence arose.<sup>22</sup> Finally, where a body corporate was convicted of an offence, “every director and every person concerned in the management of the body corporate” was deemed to be guilty if it is proved that the act or omission that constituted the offence took place with his “authority, permission, or consent”.<sup>23</sup>

The maximum fine for most offences was \$3,000,<sup>24</sup> although certain offences attracted a penalty of up to \$10,000 (plus \$1,000 a day).<sup>25</sup> These penalties could be doubled if “in the opinion of the Court recording the conviction, the offence which is the subject of the conviction amounts to a wilful disregard or contravention of any decision of the High Court on an appeal under section 33”.<sup>26</sup> Finally, if an offence related to the breach of a scheduled process that is the subject of a licence, the Court could, in addition to or instead of imposing any other penalty, cancel the licence.<sup>27</sup>

The Town and Country Planning Act 1977 was, as the name suggests, the primary planning statute in New Zealand, its purpose being to “consolidate and amend the law relating to the preparation, implementation, and administration of regional and district planning and to make provision for maritime planning”.<sup>28</sup> Councils, and other public bodies and local authorities having jurisdiction within a district, were under an obligation to enforce the observance of the requirements and provisions of district schemes operative in their area.<sup>29</sup> Its offence and penalty provisions were relatively straight-forward. In terms of the former, in addition to

---

<sup>21</sup> Section 49.

<sup>22</sup> Section 50(2).

<sup>23</sup> Section 50(3).

<sup>24</sup> Section 52(1).

<sup>25</sup> Section 52(2)(a).

<sup>26</sup> Section 52(5). Section 33(1) dealt with appeals from “any person” regarding matters such as “[b]eing an applicant for a licence, he is aggrieved by the refusal of the licensing authority to issue that licence” (s 33(1)(f)), whereas s 33(2) dealt with appeals from a local authority regarding matters such as “[b]eing the local authority within whose district the material premises are situated, it is aggrieved by a refusal of the Director-General, in relation to a particular case, to issue a notice under section 9 of this Act or by the terms of any notice issued or proposed to be issued by him under that section” (s 34(2)(c)).

<sup>27</sup> Section 53(1).

<sup>28</sup> Town and Country Planning Act 1977, long title. For a more detailed discussion, see Resource Management Law Reform Core Group *Analysis of Existing Statutes: Legal Analysis Part 1: Town and Country Planning Legislation and Procedures* (Ministry for the Environment, Working Paper 7, July 1988).

<sup>29</sup> Section 62(3).

certain specific offences,<sup>30</sup> it was an offence to fail to comply with or act in contravention of any “condition, restriction, obligation, prohibition, or covenant which has been imposed by the [Planning Tribunal] or the Council or any Maritime Planning Authority in exercising any power conferred by this Act”, or act in contravention of or fail to comply with any provision of the Act or any regulation in force under the Act.<sup>31</sup> In terms of penalties, at the time the statute was repealed the maximum penalty for any offence against the Act was a fine not exceeding \$10,000 (and \$1,000 per day for continuing offences).<sup>32</sup>

What can be seen, therefore, is that each of these statutes varied in terms of matters such as the elements of the offences, penalties and institutional arrangements (often also within the statutes themselves). In some of the statutes the offences were quite specific, while others relied more on all-encompassing provisions, and there was a mixture of public welfare strict liability, statutory liability without fault and (a limited number of) full *mens rea* offences. Maximum penalties ranged from the minor to the significant (with some including the ability to cancel licences) and a range of parties were responsible for enforcing the legislation. Perhaps the only consistent aspect was that (due to the absence of any provisions otherwise) cases were heard by District Court Judges, although, as discussed below, it seems that, in practice, relevant cases were put before Planning Judges (as they were called then) as much as possible.<sup>33</sup>

### *B Goals, but no Specifics, in the Resource Management Law Reform Project*

Towards the latter stages of the 1980s, there was dissatisfaction with the resource management legislation generally. A draft Water and Soil Bill, which would consolidate and amend the law relating to water and soil conservation, was created. Then, the Town and Country Planning Act 1977 was reviewed by Antony Hearn QC in 1987.<sup>34</sup> He made a number of recommendations for change and his work led to the Resource Management Law Reform process commencing later that year.<sup>35</sup> It was this process that resulted in the RMA, and therefore it is worth considering some of the issues with the previous legislation, so far as they relate to enforcement, that were identified and how it was proposed to deal with them.

---

<sup>30</sup> For instance, ss 75(7), 92 and 93.

<sup>31</sup> Section 172.

<sup>32</sup> Section 173.

<sup>33</sup> See Section IIIC2 below.

<sup>34</sup> Antony Hearn *Review of the Town & Country Planning Act 1977* (Department of Trade and Industry, 1987).

<sup>35</sup> New Zealand Productivity Commission *A history of town planning: Research note* (2015).

Phase one of the Resource Management Law Reform process involved, among other things, the clarification of the boundaries of the review, agreement on guiding principles for the review, identification of the fundamental issues, goals and problems relating to natural resource management, Treaty of Waitangi implications and the establishment of desired purposes and objectives for natural resource management.<sup>36</sup> One of the early tasks was obtaining the views of various government departments, including the Ministry for the Environment, the Department of Conservation and the Department of Justice, about the existing statutes.<sup>37</sup> In terms of the enforcement provisions in the Water and Soil Conservation Act 1967, the Ministry for the Environment considered that prosecutions were difficult (despite recent changes) and that Regional Water Boards were reluctant to bring charges.<sup>38</sup> Further, fines remained low despite the maximum penalty having been raised to \$150,000 and the Ministry noted there were powers to recover monies spent on restoration as part of a prosecution, but these were not being “fully exercised”.<sup>39</sup> While there was no meaningful analysis of the enforcement provisions in the Clean Air Act 1972,<sup>40</sup> the Ministry for the Environment also had concerns about enforcement under the Town and Country Planning Act 1977, observing that both convictions and fines were “notoriously difficult to achieve”.<sup>41</sup> The Tourist & Publicity Department concurred, noting that “prosecutions appear to be very rare partly because of the costs and complexity of securing enforcement action through the district court system”.<sup>42</sup>

“Phase one” of the reform process concluded with a report that was “[f]or consideration by Ministerial Committee on reform of Local Government and Resource Management”<sup>43</sup> and a discussion paper entitled “Directions for Change”.<sup>44</sup> These documents recorded the view that enforcement was being affected by unsatisfactory monitoring of the “long term and cumulative effects of resource management decisions” and that submitters believed resource management laws to “have ‘no teeth’ because offenders are seldom prosecuted, and even when they are, the fines are so low that it is cheaper to pay the fine than it is to obey the

---

<sup>36</sup> Resource Management Law Reform Core Group *Report on Phase 1: For consideration by Ministerial Committee on reform of Local Government and Resource Management* (6 July 1988) at 17.

<sup>37</sup> Resource Management Law Reform Core Group *Analysis of Existing Statutes: Departmental Views* (Ministry for the Environment, Working Paper 2, July 1988).

<sup>38</sup> At 23 (of Water and Soil Conservation Act 1967 review).

<sup>39</sup> At 23 (of Water and Soil Conservation Act 1967 review).

<sup>40</sup> Rather, the offence and penalty provisions were simply summarised by the Department of Health (at 12 (of Clean Air Act 1972 review)).

<sup>41</sup> At 64 (of Town and Country Planning Act 1977 review).

<sup>42</sup> At 65 (of Town and Country Planning Act 1977 review).

<sup>43</sup> Resource Management Law Reform Core Group, above n 36.

<sup>44</sup> Ministry for the Environment *Directions for change: A discussion paper* (August 1988).

laws.”<sup>45</sup> The focus for phase two, in terms of enforcement, was going to be to consider ways to improve monitoring and how “resource management laws can get users to recognise the costs of their decisions.”<sup>46</sup>

The two most relevant “phase two” working papers, for the purposes of this chapter, were issued in November 1988. One considered the role of courts and tribunals in resource management disputes, concluding that there should be an increased role for Planning Judges (as they were called then) in hearing prosecutions.<sup>47</sup> The other focussed on issues with the enforcement of current resource management legislation and the “initial task” it covered was:<sup>48</sup>

... to give a broad overview of the issues and principles involved. It is not intended that this work go into the fine detail of individual case studies, but general examples are given to illustrate problem areas. Further, more detailed work will may [sic] be required as part of Phase 2B.

Accordingly, many of the issues were either only introduced or two sides of an argument were raised but not resolved. For instance, in terms of the former, when discussing the time limits for taking enforcement action, the report simply noted that “in particular as to the laying of informations, [these] need to be examined”.<sup>49</sup> An example of the latter is that, when discussing the burden of proof, it was observed that one submitter considered “the standard of proof required at present is unrealistically high”, but “[a]gainst this, it is important to remember that defendants have rights too”.<sup>50</sup> The problem with this approach, however, is that there were no further working papers on enforcement issued – indeed, it appears that there were only two more working papers in total issued after this paper<sup>51</sup> – and there is no record of these issues being considered in any more detail. Further, the papers appear to have been prepared in isolation from those concerning the front-end sections of the Act, meaning that the ideas were always going to be somewhat abstract.

---

<sup>45</sup> Resource Management Law Reform Core Group, above n 36, at 61-62; Ministry for the Environment, above n 44, at 25.

<sup>46</sup> Resource Management Law Reform Core Group, above n 36, at 62.

<sup>47</sup> Resource Management Law Reform Core Group *Resource Management Disputes: Part A: The Role of Courts and Tribunals; Part B: Mediation* (Ministry for the Environment, Working Paper 22, November 1988). It is convenient to discuss this in more detail in section IIIC2 below.

<sup>48</sup> Resource Management Law Reform Core Group, above n 2, at 9.

<sup>49</sup> At 41.

<sup>50</sup> At 40-41.

<sup>51</sup> Compliance and Enforcement Issues in Resource Management was the 30<sup>th</sup> paper and 32 papers were published in total: Geoffrey Palmer “The Resource Management Act - How we got it and what changes are being made to it” (address to the Resource Management Law Association, New Plymouth, 27 September 2013).



Broadly, however, the enforcement issues identified with the previous legislation can be put into two categories. First, there were a number of problems with prosecuting, with reference being made to a “number of contributors” who had “referred to instances where it has been difficult to institute a prosecution for a number of different reasons, such as cost, insufficient evidence, time limits, time delays, technicalities, burden of proof, etc.”<sup>52</sup> Second, the level of penalties was a concern, with the comment made that prosecution would “only be effective if penalties are a sufficient disincentive” and that penalties should be “sufficient to warrant taking prosecution”.<sup>53</sup>

Enforcement was mentioned in two final documents in the Resource Management Law Reform process. First, very soon after the working paper on enforcement and compliance was issued the Government published its proposal document, which suggested one integrated statute called the Resource Management Planning Act.<sup>54</sup> In terms of enforcement, this document noted that the Government had “agreed in principle that the Planning Tribunal should have a role in resource management enforcement procedures” and it repeated some of the difficulties people had raised with prosecuting, including “cost, insufficient evidence, time limits, delays, technicalities, and burden of proof” and that these “need to be considered further”.<sup>55</sup> Similarly, it set out “general principles which could be applied in assessing what penalties to apply”, including that “penalties should present a realistic disincentive to offending... there should be ability to compel action or clean up [and]...there should be ability to recompense those who have suffered...”.<sup>56</sup> It suggested that individuals have a greater role in seeking compliance with the Act, with options suggested including allowing persons to apply to the Planning Tribunal for orders: that local authorities carry out their obligations; declaring what matters and proposed actions do and do not comply with the law; and – somewhat oxymoronically – “environmental civil prosecutions”.<sup>57</sup>

A large number of submissions were received on the proposals and these were summarised in the other “final” document that mentioned enforcement.<sup>58</sup> It was observed that “[m]ost submissions agreed that the Planning Tribunal should have a role in resource management

---

<sup>52</sup> Resource Management Law Reform Core Group, above n 2, at 5.

<sup>53</sup> At 6.

<sup>54</sup> Ministry for the Environment *People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform* (December 1988) at 3.

<sup>55</sup> At 61.

<sup>56</sup> At 61.

<sup>57</sup> At 62.

<sup>58</sup> Resource Management Law Reform Core Group *Public Submissions on "People, Environment, and Decision Making"* (Ministry for the Environment, Working Paper 32, April 1989).

enforcement, mostly because its members have the relevant expertise.<sup>59</sup> Further, “[m]ost submissions, particularly from individuals and environmental groups, supported the proposal that individuals be able to bring enforcement actions”.<sup>60</sup> Finally, submissions “discussed several other issues regarding compliance, particularly the need to have an agency auditing the performance of local and regional authorities”,<sup>61</sup> and that there was a need for “realistic fines” and different mechanisms to obtain compliance.<sup>62</sup> By the end of the Resource Management Law Reform process there was, therefore, support for the general view that prosecution needed to be made easier and more worthwhile. However, there were still no developed solutions as to how this would happen and only limited consideration had been given to the trade-offs involved.

### *C “One Way Traffic” in the Resource Management Bill*

The next step was the Resource Management Bill and this was read for the first time on 5 December 1989.<sup>63</sup> The Explanatory Note listed ten “[m]ajor problems identified in current resource management systems”, two of which were that monitoring of the law is “uneven” and enforcement is “difficult”.<sup>64</sup> Under the heading “enforcement”, it began:<sup>65</sup>

The Bill aims to strengthen the enforcement provisions of the existing law. It enables individuals to take a more direct role in enforcement proceedings. Stricter enforcement provisions are necessary to provide prompt remedies where environmental damage is occurring or likely to occur. At the same time, the Bill aims to provide enforcement mechanisms that are fair and do not involve undue intrusion into individual rights.

The first point to note is that the “more direct role” for individuals in enforcement proceedings did not extend to prosecutions. While individuals retained the right to bring a private prosecution, as noted in Chapter 5 members of the public were not given the same abilities as a local authority to obtain evidence and were not given any significant way of having their costs paid, meaning that this ability was – and remains – largely illusory. Nor did the “more direct role” extend (understandably) to abatement notices, and the infringement offence regime had not been imported into the Act yet (and cannot be used by individuals in any event). Rather, individuals were limited to seeking declarations (to the extent these are part of “enforcement”) and applying for enforcement orders.

---

<sup>59</sup> At 66.

<sup>60</sup> At 66.

<sup>61</sup> At 66-67.

<sup>62</sup> At 67.

<sup>63</sup> Resource Management Bill 1989 (224-1).

<sup>64</sup> (explanatory note) at i-ii.

<sup>65</sup> (explanatory note) at x.

In terms of the offences and penalties themselves, the Explanatory Note stated:<sup>66</sup>

The Bill also sets out offence provisions based on strict liability. The period for prosecution of offences (6 months) will apply from the time it was reasonable to discover the offence, rather than from when it was committed. The Bill allows for company officers to be personally liable for offences they knew about or ought to have known about. Limited defences against prosecution, covering various emergency situations, are provided for in Part XI of the Bill. These limited provisions aim to cater for emergency situations while maintaining an incentive for people to plan ahead to avoid environmental damage.

...

The aim of the Bill is to allow for fines that can serve as a real deterrent. The maximum fine will be \$150,000 plus \$10,000 for each day of the offence. Imprisonment is a sentencing option.

No mention was made of the institutional arrangements for prosecutions in the Explanatory Note, but it was implied in the Bill that charges would primarily be brought by local authorities. The Bill provided that prosecutions would be heard in the District Court and, except where otherwise directed by the Chief District Court Judge, by a District Court Judge who is also a Planning Judge (as they were then).

The offences, penalties and institutional arrangements were largely unchanged by the time the RMA was enacted (the maximum fine was, however, raised from \$150,000 to \$200,000 and the liability without fault defences were modified during the Parliamentary process) and these will be considered next. However, to conclude this section it can be observed that, as the Bill proceeded through its various stages, enforcement was only periodically mentioned and in very general terms. For instance, during the first reading the Rt Hon Geoffrey Palmer, the Minister for the Environment (and Prime Minister), largely repeated aspects of the explanatory note, mentioning the “clear offence provisions” and “strengthened” penalties,<sup>67</sup> while the Deputy Prime Minister, the Hon Helen Clark, simply noted that the previous “legislation was a mess, and enforcement of the law was poor”.<sup>68</sup> While one opposition member referred to the Bill as having “some Draconian effects”, and doubted the dangers to the environment were what they had been made out to be,<sup>69</sup> the Bill was supported by the opposition and went to select committee for consideration.

---

<sup>66</sup> (explanatory note) at xi.

<sup>67</sup> (5 December 1989) 503 NZPD 14168.

<sup>68</sup> (5 December 1989) 503 NZPD 14174-14175.

<sup>69</sup> (5 December 1989) 503 NZPD 14183.

When the Bill was read a second time, on 28 August 1990, the Rt Hon Geoffrey Palmer again simply referred to the importance of improving enforcement, noting that this had been the “poor relation in current practice”.<sup>70</sup> After this there was a change in government, and the new National Government appointed a Review Group to consider the Resource Management Bill. However, nothing was said by the Review Group about enforcement, the only tangential references being that the Group saw a place for economic instruments in resource management (a key part of the terms of reference had been for the Group to consider whether the Bill contained a suitable framework for the introduction of these),<sup>71</sup> but that these should “complement and supplement” (rather than replace) regulatory instruments.<sup>72</sup> The RMA was then read a third time and given Royal Assent on 22 July 1991, and came into force on 1 October 1991.

### *III The RMA's Offences, Penalties and Institutional Arrangements – Few Indicators of Substantive Criminality*

Against this background, the RMA's offences and penalties, and the institutional arrangements for dealing with prosecutions, are analysed in this section. It is observed that the approach adopted by the Government in drafting the relevant provisions (and supported by the courts in their interpretations) was largely consistent with the enforcement goals of the Resource Management Law Reform process, in that the barriers to prosecution were reduced and prosecuting was made more worthwhile. However, it is argued that, because there was a lack of specificity in the Resource Management Law Reform process as to how to achieve these goals, and the trade-offs to such moves were never discussed, the Government (and the courts) ended up going too far. The offences contain few indicators of substantive criminality, and nor do the penalties imposed pursuant to the offences, and the institutional arrangements for hearing prosecutions differ from those found in other criminal cases.

#### *A Offences*

As just noted, one of the goals of the Resource Management Law Reform process, so far as it related to enforcement, was to make prosecution easier. One way to do this was procedurally, and this was achieved by stripping away restrictions in the previous legislation,

---

<sup>70</sup> (28 August 1990) 510 NZPD 3953.

<sup>71</sup> *Discussion Paper on the Resource Management Bill Prepared by the Review Group* (1990) at 45-47.

<sup>72</sup> *Report of the Review Group on the Resource Management Bill* (11 February 1991) at 83.

such as who could prosecute<sup>73</sup> and notification requirements,<sup>74</sup> and adopting a standard timeframe for bringing proceedings.<sup>75</sup> The other way was in the definitions of the *actus reus* and *mens rea* of the offences, and prosecution was made easier in this regard in two ways. First, a very expansive approach is taken in the RMA as to who can be prosecuted and for what (assisted by the courts with their interpretations of certain key terms). Second, no mental element needs to be proved for any of the offences, with the only defences provided being more restrictive than at common law and with the onus on the defendant to promptly notify the prosecutor that it would be relying on them. However, this approach to the *actus reus* and *mens rea* of the offences means that they contain few indicators of substantive criminality.

### *1 Casting the net widely*

The first definitional way that the RMA made prosecution easier was to make a large number of people potentially liable for a wide range of offending. In terms of the former, s 338(1) of the Act commences by stating that “[e]very person commits an offence against this Act who *contravenes, or permits a contravention of*, any of the following...”.<sup>76</sup> Starting with “contravenes”, which is defined as including “fail to comply with”,<sup>77</sup> the first point to note is that this is broad enough to mean that, in addition to individuals, companies can be “directly” liable under the Act. For instance, in one of the leading cases on RMA liability, *McKnight v NZ Biogas Industries Ltd*, there was no argument that the defendant company, which had been responsible for the installation of the 450,000 litre capacity elastic bladder that had subsequently burst, may have directly contravened the Act; rather, the case related solely to whether it had caused the discharge.<sup>78</sup> Further, when a challenge to direct corporate liability was made, on the basis that the defendant company had contracted out the management of the

---

<sup>73</sup> Compare s 48(3) of the Clean Air Act 1972.

<sup>74</sup> Compare s 49 of the Clean Air Act 1972.

<sup>75</sup> Compare s 34(7) of the Water and Soil Conservation Act 1967 (one year from when the matter arose), s 50(2) of the Clean Air Act 1972 (one year from when the matter arose) and the Town and Country Planning Act 1977 (no specific timeframe, which meant that the six months from when the matter arose time limit specified in s 14 of the Summary Proceedings Act 1957 applied). It can be observed that it has recently been proposed to extend the current time frame of six months from when the contravention “first became known, or should have become known, to the local authority” to one year: see Cabinet Paper *Proposed Resource Management Amendment Bill: Stage 1 of a resource management system review* (2018) at [66]; Resource Management Amendment Bill 2019 (180-1), cl 62.

<sup>76</sup> Emphasis added.

<sup>77</sup> RMA, s 2(1).

<sup>78</sup> *McKnight v NZ Biogas Industries Ltd* [1994] 2 NZLR 664 (CA). The issue of causation is discussed below.

business to another person or entity and so had not contravened the Act, this was given short shrift by the courts.<sup>79</sup>

However, even if the company is not directly liable, it may still be vicariously liable pursuant to s 340(1)(a) of the RMA. This provision, which has a number of similarities to s 204(1) of the Mining Act 1971,<sup>80</sup> states that “[w]here an offence is committed against this Act by any person acting as the agent (including any contractor) or employee of another person, that other person shall, without prejudice to the liability of the first-mentioned person, be liable under this Act in the same manner and to the same extent as if he, she, or it had personally committed the offence”.<sup>81</sup> This has been held to not be a standalone offence, but rather supplements s 338(1) and does not need to be referred to in the charging documents.<sup>82</sup> This means that there is great scope for a local authority to commence proceedings against a company, instead of or in addition to a responsible individual, leaving it to determine the precise basis for liability at a later date.<sup>83</sup>

The next point is that the defences for those charged vicariously must be proved by the defendant and are quite restricted. If the person charged is a natural person, the defendant must prove that “he or she did not know, and could not reasonably be expected to have known, that the offence was to be or was being committed”, or that “he or she took all reasonable steps to prevent the commission of the offence”.<sup>84</sup> If the person charged is a non-natural person, it must prove that “neither the directors (if any) nor any person involved in the management of the defendant knew, or could reasonably be expected to have known, that the offence was to be or was being committed”, or that “the defendant took all reasonable steps

---

<sup>79</sup> *Southland Regional Council v Sandstone Dairy Ltd* DC Invercargill CRN06017500043, 44 & 91, 14 December 2006; appeal against conviction dismissed (but appeal against sentence allowed): *Sandstone Dairy Ltd v Southland Regional Council* HC Invercargill CRI 2007-425-1, 15 May 2007.

<sup>80</sup> Section 204(1) of the Mining Act 1971 states that if an offence is committed against subs (1) (the killing or injuring of a person in or about a mine as a result of the negligence of another person) “by any person acting as the agent or servant of another person, that other person shall, without prejudice to the liability of the first-mentioned person, be liable under this Act in the same manner and to the same extent as if he had personally committed the offence.”

<sup>81</sup> Paragraph (b) is the same as for persons in charge of a ship and its owner. There are defences provided in subs (2), which are referred to below. In some ways, s 338(1) and s 340(1) mirror the two routes to attribution liability discussed by Tipping J in *Linework Ltd v Department of Labour* [2001] 2 NZLR 639 (CA) at [44]-[47], albeit in that case there was no vicarious liability provision and so the second route relies on attribution pursuant to *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC).

<sup>82</sup> *Southland Regional Council v Sandstone Dairy Ltd*, above n 79, at [32]-[34]; *Fulton Hogan Ltd v Canterbury Regional Council* [2018] NZDC 17099 at [44]-[59] (appeal dismissed: *Fulton Hogan Ltd v Canterbury Regional Council* [2019] NZHC 1767).

<sup>83</sup> In *Fulton Hogan Ltd v Canterbury Regional Council*, above n 82, the Judge considered that the defendant knew the basis on which it had been charged, although the local authority was still required to file a memorandum explicitly setting this out (at [99]).

<sup>84</sup> RMA, s 340(2)(a)(i).

to prevent the commission of the offence”.<sup>85</sup> In both instances, the defendant must also prove that they took “all reasonable steps to remedy any effects of the act or omission giving rise to the offence”.<sup>86</sup>

Further, as noted above, the local authority does not have to specify that it is relying on s 340(1) in the charging documents, which can make the availability of the defences problematic. For instance, the prosecutor may specify only that the defendant’s conduct “contravenes” under s 338(1) in its charging document and ultimately opt against relying on vicarious liability at trial, seemingly precluding the defences from being run. In *Southland Regional Council v Sandstone Dairy Ltd*, the Court countered this possibility by stating that “any defendant can make out on the balance of probabilities that he is only liable under section 340(1) and that the defences under section 340(2) apply”,<sup>87</sup> but as noted by counsel for the defendant in *Fulton Hogan Ltd v Canterbury Regional Council*, this would seem “contrary to established principles concerning the burden of proof in criminal proceedings”.<sup>88</sup> The preferred course, in *Fulton Hogan Ltd v Canterbury Regional Council*, was that “the s 340(2) defences apply whenever vicarious liability is imputed simply by operation of s 340(1)”,<sup>89</sup> which was affirmed in the High Court as it “serves to give the statutory defences a universal application. This would otherwise be arbitrarily limited not by reference to the substance of the prosecution but by the happenstance of a charging document”.<sup>90</sup> However, it is not clear how easy this will be to apply in practice, with the availability of the defence still seemingly depending, to a large extent, on the way that the prosecution runs its case at trial.

The third way that a company can be liable is “indirectly”, by “permitting a contravention” of the Act. The word “permits” was considered in *Waikato Regional Council v Hillside Ltd* and given an expansive meaning, with Judge Newhook stating:<sup>91</sup>

---

<sup>85</sup> Section 340(2)(a)(ii).

<sup>86</sup> Section 340(2)(b). There was no directly equivalent defence in the Mining Act 1971, although it can be observed that s 235(1) allowed an owner to escape liability if it and a manager are both liable and it “was not in the habit of taking, and did not in respect of the matters in question take, any part in the management of the mine”, it “made all the financial and other provision necessary to enable the manager to carry out his duties” and the “offence was committed without [its] knowledge, consent, or connivance”. Section 235(3) also provided that “[i]t shall be a defence in any proceedings brought against the owner or manager of a mine in respect of an offence against this Act if he proves that the offence was committed owing to causes over which he had no control and against the happening of which it was impracticable for him to make provision.”

<sup>87</sup> *Southland Regional Council v Sandstone Dairy Ltd*, above n 79, at [35].

<sup>88</sup> *Fulton Hogan Ltd v Canterbury Regional Council*, above n 82, at [40].

<sup>89</sup> At [49].

<sup>90</sup> *Fulton Hogan Ltd v Canterbury Regional Council*, above n 82, at [68].

<sup>91</sup> *Waikato Regional Council v Hillside Ltd* DC Te Awamutu CRI-2008-019-500880-919, 20 July 2009 at [262] (upheld in *Crafar v Waikato Regional Council* HC Hamilton CRI-2009-419-67-69, 13 September 2010 at [50]-

I find myself in agreement with the submissions of Mr Pilditch based on several dictionary definitions, and having regard to the broad and important purpose of the Act, that the concept of "permits" encompasses:

- a) Providing or affording opportunity for acts or omissions;
- b) Allowing acts or omissions to be done or occur;
- c) Acquiescence to acts or omissions;
- d) Abstinence from prevention of acts or omissions;
- e) Tolerating acts or omissions.

The wide interpretation of this term also considerably opens up another group of persons to liability, namely directors or persons involved in the management of companies. For instance, in *Waikato Regional Council v Hillside Ltd* itself the defendant company and its three directors faced charges relating to the unlawful discharge of dairy effluent,<sup>92</sup> with the allegation against the three individuals being that they permitted the contravention of s 15.<sup>93</sup> It was sufficient to ground liability that they were directors and persons concerned in the management of the business who were aware of, and did not stop, the problems.<sup>94</sup>

This intervention from the courts is important because this is one area where those involved in the Resource Management Law Reform process had urged caution, and where the Government had seemingly followed their advice. The working paper on Enforcement and Compliance Issues in Resource Management had observed that a “suggestion has been made that for deliberate breaches of environmental codes, criminal liability be imposed on directors of companies, (as it the practice in USA and Canada)” and it was commented that “[w]here such behaviour is flagrant and destructive, and clearly of a criminal nature, there may be justification for this approach”.<sup>95</sup> However, it went on to note that “legislation of this kind would be something of a departure in New Zealand, the implications of which would need to be considered carefully” and that, as “it is a company law matter, and outside the scope of

---

[57]). Put another way, “for a person to be convicted of permitting a contravention of the Act under s 338(1), it is necessary for the prosecutor to prove that the person so charged had some knowledge at the relevant time that the activities constituting the offence were occurring or would occur or otherwise permitted their occurrence in one of the ways described in the *Crafer* case”: see *Gu v Auckland Council* [2017] NZDC 29242 at [26].

<sup>92</sup> *Waikato Regional Council v Hillside Ltd*, above n 91.

<sup>93</sup> The amendment to “permitting the contravention of”, instead of simply “contravening” was made at the start of the trial: at [5].

<sup>94</sup> Six charges were dismissed against one of the defendants, on the basis that the council had not proven that she had knowledge of the problems until mid-December 2007, the Council having directed its communications to the company and the other directors before then. The local authority expressly did not rely on s 340(3) to establish liability: at [259].

<sup>95</sup> Resource Management Law Reform Core Group, above n 2, at 44.



RMLR, it is probably inappropriate to discuss it any further here”.<sup>96</sup> Accordingly, the mechanism in the RMA for holding directors and management liable, s 340(3), is quite restrictive, providing:

If a person other than a natural person is convicted of an offence against this Act, a director of the defendant (if any), or a person involved in the management of the defendant, is guilty of the same offence if it is proved—

(a) that the act or omission that constituted the offence took place with his or her authority, permission, or consent; and

(b) that he or she knew, or could reasonably be expected to have known, that the offence was to be or was being committed and failed to take all reasonable steps to prevent or stop it.

Indeed, s 340(3) has been described as “a rather complex offence formula not requiring full *mens rea*, but requiring a degree of actual or constructive culpability or fault, with the onus on the prosecution to prove lack of due diligence”.<sup>97</sup> The rationale for this wording is unclear, but it would appear that the Government simply opted for the deeming provision found in two of the previous resource management statutes,<sup>98</sup> but then tried to limit it by importing the “due diligence” provision from s 340(2) (which is discussed next).

This is an awkward combination, but because *Waikato Regional Council v Hillside Ltd* made it easier for directors to be prosecuted indirectly (for “permitting a contravention”), there is rarely a need to rely on s 340(3) and it is used infrequently. Indeed, in the one of the few cases where it has been successfully used, *Canterbury Regional Council v Foster*, the Judge noted that, if s 340(3) had failed, he would have amended the informations to “reflect my finding that the evidence presented by the Council also establishes that Mr Foster permitted the offences as identified in or consistent with the *Crafar* decision.”<sup>99</sup> Further, local authorities appear to have adjusted their practices to maximise the chances of directors or management coming within the definition of “permitting”. For instance, the Waikato Regional Council’s Basic Investigative Skills for Local Government state that it is “good practice (when issuing an abatement notice to a company) to serve the original of the notice to the company’s registered office and also to serve copies of that notice to each of the

---

<sup>96</sup> At 44.

<sup>97</sup> David Grinlinton “Enforcement mechanisms under the RMA” (1992)(3) Planning Quarterly 13 at 19. Grinlinton notes further (at 19) that this “obligation is the reverse of the traditional ‘strict liability’ offence where commission of the proscribed activity raises a presumption of liability, with the onus on the defence to prove there was no fault”.

<sup>98</sup> See s 47L(3) of the Petroleum Act 1937, as amended by s 3 of the Petroleum Amendment Act 1975, and s 50(3) of the Clean Air Act 1972.

<sup>99</sup> *Canterbury Regional Council v Foster* DC Christchurch CRI-2013-009-2076, 30 May 2014 at [30].

company directors, as well as any site liaison officer or site environment officer”, because it “can often bring attention and pressure from the directors onto site management to reach compliance” and “*if there is future non-compliance, it can clearly be shown that the directors have been made aware of previous non-compliance issues*”, which “would make it very difficult to plead ignorance or establish a defence under section 340 and 341 RMA.”<sup>100</sup>

To summarise to this point, in addition to individuals, liability has also been extended directly, vicariously and indirectly to companies. Further, while a relatively limited role was originally given to director/management liability, by way of s 340(3), the courts have stepped in to expand this greatly by interpreting “permitting a contravention” broadly. It is no surprise, then, that the RMA has been described as having a “wide net of potential liability for criminal offending”,<sup>101</sup> with it being entirely conceivable that a breach of the Act could, simultaneously, be committed by an individual, his or her corporate employer and its directors/management.

The next point to consider, then, is what breaches these people and entities can be prosecuted for. Section 338(1) lists these as contraventions (or permitting the contravention) of:

- (a) sections 9, 11, 12, 13, 14, and 15 (which impose duties and restrictions in relation to land, subdivision, the coastal marine area, the beds of certain rivers and lakes, water, and discharges of contaminants):
- (b) any enforcement order:
- (c) any abatement notice, other than a notice under section 322(1)(c):
- (d) any water shortage direction under section 329.

For present purposes, these breaches can be separated into two groups – the first is breaches of ss 9, 11, 12, 13, 14 and 15, and the second is breaches of an enforcement order, an abatement notice or any water shortage direction. The difference is that the former are “one-step” breaches (in that a duty or restriction is being directly breached) and the latter can be referred to as “two-step” breaches (in that a Court order or an administrative notice or direction must first be made, and it is the breach of this order, notice or direction that is an offence). However, in many instances a two-step breach will also be a one-step breach – for instance, someone may have received an abatement notice ordering them to cease discharging a contaminant, which if breached will be both an offence against s 338(1)(a) and an offence

<sup>100</sup> Waikato Regional Council *Basic Investigative Skills for Local Government* (2016) at 104 (emphasis added).

<sup>101</sup> *Fulton Hogan Ltd v Canterbury Regional Council*, above n 82, at [55].

against s 338(1)(c).<sup>102</sup> The focus here is on breaches of s 15 and an abatement notice, as they are the most prevalent prosecutions in each group.<sup>103</sup>

Looking first at s 15 breaches, subs (1)(b) (by way of example) provides that “[n]o person may discharge any ... contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water ... unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent”. Such an offence reflects a model that has been described as the “administrative dependence of environmental criminal law”.<sup>104</sup> This means that what is criminalised is not polluting per se, but polluting without a licence (or outside the terms of the licence).<sup>105</sup>

It can immediately be observed that this provision is already quite wide, as the default position is that the discharge is prohibited and the discharge of contaminants onto or into land only needs to be in circumstances where it *may* enter water (unless expressly allowed).<sup>106</sup> However, it is made wider by the interpretation of the words “contaminant” and “discharge”. In terms of the former, the definition in s 2(1) is very broad, including “any substance...or

---

<sup>102</sup> For a discussion of “two-step” breaches generally, see AP Simester and Andreas Von Hirsch “Regulating Offensive Conduct through Two-Step Prohibitions” in AP Simester and Andreas Von Hirsch (eds) *Incivilities: regulating offensive behaviour* (Hart Publishing, Portland, 2006); Andrew Ashworth and Lucia Zedner “Just Prevention: Preventive Rationales and The Limits of the Criminal Law” in RA Duff and Stuart Green (eds) *Philosophical foundations of criminal law* (Oxford University Press, New York, 2011) at 298-299; RA Duff “Perversions and Subversions of Criminal Law” in RA Duff and others (eds) *The Boundaries of the Criminal Law* (Oxford University Press, New York, 2010) at 97-102.

<sup>103</sup> In terms of the first group, 39 of the 81 prosecutions in 2014/15 were for section 15 breaches, as were 32 of the 57 prosecutions in 2015/16 and 50 of the 71 prosecutions in 2016/17: Ministry for the Environment “Enforcement actions” (2017) <[www.mfe.govt.nz](http://www.mfe.govt.nz)>. In terms of the second group, while there is no data kept on the number of these prosecutions (they are counted together and often supplement a prosecution for a “one-step” breach, so do not get recognised in the statistics), it can be expected that there are more abatement notice prosecutions, as there is a significantly higher number of abatement notices issued than enforcement orders made or water shortage directions. For instance, there were 1,925 abatement notices issued in 2014/2015, 2,325 issued in 2015/2016 and 1,876 issued in 2016/2017, compared with 20 enforcement order applications in 2014/2015, 16 applications in 2015/2016 and 25 in 2016/2017, and 7 water shortage directions in 2016/2017: Ministry for the Environment *National Monitoring System for 2014/15* (2016); Ministry for the Environment *National Monitoring System for 2015/16* (2017); Ministry for the Environment *National Monitoring System for 2016/17* (2018). There will also have been enforcement orders made on sentencing, but there is no record of this. The number of water shortage directions made was not recorded in 2014/2015 or 2015/2016, but is likely to be minimal like it was in 2016/2017.

<sup>104</sup> Michael Faure “The revolution in environmental criminal law in Europe” (2017) 35(2) *Virginia Environmental Law Journal* 321 at 327-330.

<sup>105</sup> As Faure has noted (at 328), two consequences of this are that “ecological values are not directly protected through criminal law” and that “administrative authorities...receive wide powers to determine the punishable nature of certain polluting acts. Indeed, administrative authorities define the conditions of a permit and with that they effectively also determine the conditions for criminal liability”.

<sup>106</sup> There is a separate provision for the discharge of contaminants directly into water (s 15(1)(a)).

energy...or heat, that either by itself or in combination with the same, similar, or other substances, energy, or heat” that when discharged into water or onto or into land or into air “changes or is likely to change” the “physical, chemical, or biological condition”. As such, there is no room for a consideration as to the extent or effect of the change when considering liability.<sup>107</sup> In terms of the word “discharge”, which includes “emit, deposit, and allow to escape”,<sup>108</sup> this has been interpreted as extending to “cause to discharge”.<sup>109</sup> What this means, essentially, is that the test is simply whether there is a causal connection between the person and the discharge. As such, if an employee on a dairy farm fails to move an irrigator, and this results in ponding of effluent or its application to saturated ground, contrary to the relevant regional plan, he or she has caused the discharge and will potentially be liable, along with his or her manager, and their employer, to a conviction and penalty in the thousands or tens of thousands of dollars.<sup>110</sup>

Turning then to a breach of an abatement notice, this is also quite broad due to two (related) interpretations from the courts. The first is that abatement notices can be indefinite,<sup>111</sup> which means that a local authority can prosecute for breaches that occurred a long time after the notice was originally issued. This is the case even when a later abatement notice has been issued, and complied with, as happened in *Bay of Plenty Regional Council v Hood*.<sup>112</sup> While there was said to be “something unfair” about this, with the “sense of unfairness...increased having regard to the general nature of the earlier notice and the specific requirements of the later notice which were met by the defendant”, and that “the circumstances here suggest a lack of true connection between the earlier abatement notice and the laying of charges for breach of that notice after compliance with the later abatement notice”, there was no dispute that an offence had still been committed.<sup>113</sup> The second is that if the recipient has not appealed the abatement notice and is later prosecuted for breaching it, he or she cannot argue

---

<sup>107</sup> *Works Infrastructure Ltd v Taranaki Regional Council* (2002) 8 ELRNZ 84 (HC) at [14].

<sup>108</sup> RMA, s 2(1).

<sup>109</sup> *McKnight v NZ Biogas Industries Ltd*, above n 78, at 670.

<sup>110</sup> As was the case in *Otago Regional Council v Jury* [2017] NZDC 8895 and *Otago Regional Council v Liquid Calcium Ltd* [2017] NZDC 11458. But contrast *Canterbury Regional Council v Aitkens Road Dairies Ltd* [2019] NZDC 3190, where the charge against the company alleged (at [2]) “that an employee of the defendant company discharged a contaminant, namely dairy effluent, from an over-spilling solids pond onto land which may have resulted in contaminant entering ground water”, yet the employee in question was (at [11]) only issued with an infringement notice rather than prosecuted.

<sup>111</sup> *Roberts v Northland Regional Council* [2014] NZHC 284 at [24]-[25].

<sup>112</sup> *Bay of Plenty Regional Council v Hood* [2017] NZDC 25156.

<sup>113</sup> At [28].

at trial that it was wrongly issued.<sup>114</sup> The problem with this is that the recipient of an abatement notice may disagree with the notice, but decide not to challenge it if it has already done what was demanded (for instance, ceased the discharge), or it does not consider it can do what is being asked of it (for instance, if it has no practical control over the matter), due to the time and cost involved. The abatement notice is, therefore, a powerful measure that can extend liability greatly, and it is no surprise that the Ministry for the Environment says it should be an enforcement officer's "primary tool".<sup>115</sup>

The conduct that can be caught in the aforementioned "wide net of potential liability for criminal offending" is, accordingly, also very broad, and seemingly at odds with the conclusion from the working paper on compliance and enforcement issues in the Resource Management Law Reform process that it:<sup>116</sup>

...is important that offences be clearly defined. It is suggested that this will partially be achieved by determining exactly what types of conduct it is wished to prohibit and setting out a number of specific offences rather than attempting to achieve the same result by means of one very generally worded offence provision.

Indeed, when one considers the combination of who can be held liable and for what, it is suggested that the words of Farrier, in discussing Australian environmental criminal law in the early 1990s in a chapter entitled "In Search of Real Criminal Law", are more apt for the RMA:<sup>117</sup>

Little attention has been paid to the details of the definition of offences. The main concern of governments, propelled by the conservation movement, has been that they should be framed in broad terms to ensure that there are no loopholes.

If the criminal sanction is properly reserved for substantial wrongdoing, assessed predominantly by reference to harm and culpability,<sup>118</sup> then the RMA's offences are not meeting the first limb, with harmless conduct captured alongside the harmful, and people who are only tangentially linked to the conduct included. In the next subsection, the second

---

<sup>114</sup> *Waikato Regional Council v Huntly Quarries Ltd* [2004] NZRMA 32 (DC) at [50]-[55]. Instead, they will only be able to argue that the notice was invalid (at [20]-[32]). Confusingly, the Ministry for the Environment's Guidelines state (Ministry for the Environment *Best Practice Guidelines for Compliance, Monitoring and Enforcement under the Resource Management Act 1991* (2018)) that (at 88) "[w]here the notice is breached and becomes part of criminal proceedings (if a prosecution is taken), the abatement notice becomes part of the 'beyond reasonable doubt' test (see Standard of proof)", and it is unclear if the Ministry is referring to the fact (and validity) of the notice, or the reasons why it was issued.

<sup>115</sup> Ministry for the Environment, above n 114, at 88. But see the discussion in Chapter 5 as to why this is an unfortunate choice of words.

<sup>116</sup> Resource Management Law Reform Core Group, above n 2, at 38-39.

<sup>117</sup> David Farrier "In Search of Real Criminal Law" in T Bonyhady (ed) *Environmental Protection and Legal Change* (The Federation Press, Sydney, 1992) at 80.

<sup>118</sup> See Chapter 3.

limb of culpability is considered, but before doing so it can also be observed that the criminality of the offences is not helped by the labels given to them. For instance, s 15 is headed the “Discharge of contaminants into environment”, which is accurate insofar as what the provision covers, but does not accord with what the public would call it – “pollution”.<sup>119</sup> There is likely good reason why this word was avoided in s 15, in that the Government does not want to be seen to openly countenance pollution and yet this is precisely what happens when a regional rule or resource consent allows the discharge of contaminants (albeit usually subject to certain conditions). However, it only serves to downgrade and diminish the status of the offences as “criminal”.

## 2 *Limiting excuses*

The issues surrounding the mental element – if any – in the criminal offences in the new resource management statute were raised in the working paper on enforcement and compliance issues.<sup>120</sup> As discussed in the first section of this chapter, it was common for offences under the previous resource management legislation to be strict liability, although this was not universal.<sup>121</sup> However, some agencies suggested that even this was too hard to prove, and that the offences should be absolute liability (no defence of total absence of fault available).<sup>122</sup> On the other hand, it was also suggested that it would be inappropriate for “almost all offences in the environmental sphere to be strict or absolute liability”, citing the “fundamental principle of our legal system that any truly criminal offence requires a guilty mind”.<sup>123</sup> It was also commented that if imprisonment was going to be an option there would need to be an explicit mental element.<sup>124</sup>

Despite these warnings, s 341(1) of the RMA provides that “[i]n any prosecution for an offence of contravening or permitting a contravention of any of ss 9, 11, 12, 13, 14, and 15, it is not necessary to prove that the defendant intended to commit the offence”, which it can be observed is essentially the same wording as was contained in s 7A(1) of the Clean Air Act 1972,<sup>125</sup> and imprisonment is available for all offending.<sup>126</sup> This is termed “Strict liability” in

---

<sup>119</sup> It is unsurprisingly referred to as such in media reports: see, for example, Matt Shand “\$1700 an hour community work suggested by Tauranga polluter for serious breaches” *Stuff* (online ed, Wellington, 13 March 2018).

<sup>120</sup> Resource Management Law Reform Core Group, above n 2, at 42-44.

<sup>121</sup> See, for instance, s 34(1)(h) of the Water and Soil Conservation Act 1967.

<sup>122</sup> Resource Management Law Reform Core Group, above n 2, at 43-44.

<sup>123</sup> At 43-44.

<sup>124</sup> At 46.

<sup>125</sup> It is not clear why s 341(1) is restricted to these breaches, but the two-step breaches have been held to be common law strict liability offences: for breach of an enforcement order, see *Auckland City Council v Selwyn*

the heading to the section, but this is something of a misnomer given it is not strict liability in the public welfare / regulatory sense of the phrase.<sup>127</sup> Rather, the two statutory defences in subs (2) replace the common law defence of “total absence of fault”.<sup>128</sup> These defences, essentially “reasonable action in a severe emergency or unforeseeable act beyond the defendant's control”,<sup>129</sup> must be proven by the defendant and have the added hurdle that the defendant must have “adequately mitigated or remedied” the “effects of the action or event”.<sup>130</sup> This has led to the offences being described as “closer to an absolute liability standard than common law strict liability”.<sup>131</sup>

Subsection (3) of s 341 requires that the defendant give notice that he or she intends to rely on a subs (2) defence, and the facts that support his or her reliance, within 7 days of service of the summons or such further time as the Court may allow. The first point to note is that this sits awkwardly with the Criminal Disclosure Act 2008, as the prosecutor may not even have completed “Initial disclosure” within seven days.<sup>132</sup> For this reason (among others), an extension is frequently given,<sup>133</sup> but that does not detract from the main point that the defendant is being forced to give advance notice of its case if it intends to rely on this defence. No reason was given why this is required – although it can be observed that this was also a requirement of the Clean Air Act 1972<sup>134</sup> – and it is unusual for the criminal law. It could perhaps be argued that this is similar to the requirement that if a defendant intends to adduce evidence in support of an alibi he or she must give written notice to the prosecutor of

---

*Mews Ltd* DC Auckland CRN2004067301-19, 18 June 2003 at [93]-[100]; for breach of an abatement notice, see *Waikato Regional Council v Huntly Quarries Ltd*, above n 114, at [56]-[67].

<sup>126</sup> This is discussed further in the next subsection.

<sup>127</sup> As the majority put it in *Linework Ltd v Department of Labour*, above n 81, at [39], when dealing with a section (then headed) “Strict liability” in the Health and Safety in Employment Act 1992, “[t]hough called “strict liability” – see the heading to s53 – liability will always depend upon proof of blameworthiness in the particular circumstances.”

<sup>128</sup> See *Wellington Regional Council v Shell Oil New Zealand Ltd* (1993) 1A ELRNZ 306 (DC) at 308; *McKnight v NZ Biogas Industries Ltd*, above n 78, at 669; *Canterbury Regional Council v Doug Hood Ltd* (1998) 4 ELRNZ 395 (DC) at 431.

<sup>129</sup> Janette Campbell “Statutory remedies: the enforcement provisions of the Resource Management Act 1991” in Derek Nolan (ed) *Environmental and resource management law* (5th ed, LexisNexis, Wellington, 2015) at [20.45].

<sup>130</sup> RMA, s 341(2)(a)(iii) and (b)(ii).

<sup>131</sup> Campbell, above n 129, at [20.45]. See also Grinlinton, above n 97, at 18; Alastair Jewell “Case Note: *McKnight v NZ Biogas Industries Ltd* [1994] NZRMA 258” (1994) 7 Auckland University Law Review 754.

<sup>132</sup> Section 12(1) of the Criminal Disclosure Act 2008 requires this to have been completed “not later than the applicable date”, which is generally 15 working days after the commencement of the proceedings (see subs (4)).

<sup>133</sup> Indeed, in *Glenholme Farms Ltd v Bay of Plenty Regional Council* [2012] NZHC 2971 the defence was considered by the first instance Judge despite notices never being filed, with the High Court Judge considering similarly considering the appeal “as if they had been” (at [17]-[18]).

<sup>134</sup> Section 7A(3).

the particulars of it,<sup>135</sup> but as Simester and Sullivan note, an alibi is “not a defence but rather a denial that there was a prima facie offence at all.”<sup>136</sup>

The RMA’s offences, therefore, appear to also fail to meet the second limb of the “substantial wrongdoing” test. Put shortly, by not requiring the prosecution to prove *mens rea* in any of the breaches, the non-culpable are caught up with the culpable. While there are avenues by which defendants can avoid liability, these are very limited, and by requiring the defendant to prove them and notify the prosecution of its intention to do so, they interact awkwardly with fundamental criminal law concepts such as the presumption of innocence and the right to remain silent.

### *B Penalties*

The other goal of the Resource Management Law Reform process, so far as it related to enforcement, was to make prosecuting more worthwhile. The Government sought to achieve this by providing a high maximum monetary penalty (and subsequently raising it when it was believed that fines had not increased enough), making it clear that (the vast majority of) any fines imposed would go back to the local authority bringing the case, and not explicitly prohibiting insurance against fines (which has led the courts to consider that they cannot prohibit this either). However, these factors have meant that compensation for the investigation and prosecution costs of the local authority, rather than punishment, appears to be the goal of the offences, thus diminishing their substantive criminality. While the Government also provided for imprisonment as a possible sentence for individuals, which introduces other non-monetary penalties as well, the reluctance of the courts to impose these alternative sentences means that these penalties add little to the criminality of the offences. The same applies for the conviction that a guilty defendant also typically receives, as the courts have, by and large, held that this conveys no adverse moral judgment on the defendant’s character.

#### *1 A focus on insurable, compensatory monetary penalties*

As just noted, the Government tried to make prosecuting more worthwhile for local authorities in three (related) ways. First, it adopted the highest maximum penalty from any of the previous resource management statutes (\$150,000 from the Water and Soil Conservation Act 1967, which was increased to \$200,000 during the Parliamentary process), on the basis

---

<sup>135</sup> Criminal Disclosure Act 2008, s 22.

<sup>136</sup> AP Simester and others *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Hart Publishing, Oxford, 2013) at 20.



that this would result in increased fines.<sup>137</sup> Indeed, when these were still not (in 2009) considered to be high enough, “[b]ecause the ceiling on fines in New Zealand is relatively low”,<sup>138</sup> the maximum monetary penalty was increased again, to a fine not exceeding \$300,000 for natural persons and a fine not exceeding \$600,000 for non-natural persons.<sup>139</sup> As shown in Chapter 4, each of these moves resulted in average fine levels rising, albeit still only to a level that has been described as “modest”.

The second way that the Government made prosecution more worthwhile was by making it explicit that local authorities would receive (at least 90% of) any fines imposed. The relevant provision is s 342, which states that:

(1) Subject to subsection (2), where a person is convicted of an offence under section 338 and the court imposes a fine, the court shall, if the proceedings in relation to the offence were commenced by or on behalf of a local authority, order that the fine be paid to that local authority.

(2) There shall be deducted from every amount payable to a local authority under subsection (1), a sum equal to 10% thereof, and this sum shall be credited to a Crown Bank Account.

(3) Notwithstanding anything in subsection (2), where any money awarded by a court in respect of any loss or damage is recovered as a fine, and that fine is ordered to be paid to a local authority under subsection (1), no deduction shall be made under subsection (2) in respect of that money.

(4) Subject to subsection (2), an order of the court made under subsection (1) shall be sufficient authority for the Registrar receiving the fine to pay that fine to the local authority entitled to it under the order.

(5) Nothing in section 73 of the Public Finance Act 1989 shall apply to any fine ordered to be paid to any local authority under subsection (1).

The origins of s 342 are unexplained. There was no equivalent provision in any of the example statutes referred to in the first section of this chapter (the Water and Soil Conservation Act 1967, the Clean Air Act 1972 or the Town and Country Planning Act 1977).<sup>140</sup> Further, the payment of fines to local authorities was not explicitly discussed in the enforcement and compliance working paper, although reference was made (at different points) to the cost of prosecution and funding arrangements. In particular, there was support

<sup>137</sup> Resource Management Bill 1989 (224-1) (explanatory note) at xi.

<sup>138</sup> Cabinet Paper *Reform of the Resource Management Act 1991: Phase One Proposals* (2009) at 25.

<sup>139</sup> Resource Management (Simplifying and Streamlining) Amendment Act 2009.

<sup>140</sup> Reference was, however, made to s 73 of the Public Finance Act 1989 in s 34(5) of the Water and Soil Conservation Act 1967.

for local authorities being able to “pass on the true cost of enforcement”,<sup>141</sup> and it was observed that:<sup>142</sup>

The funding of enforcement is an important question because even if prosecutions are successful there is usually a financial burden carried by the prosecuting authority which in itself can act as a deterrent to bringing prosecutions in other than the clearest of cases. Environmental prosecutions can become exceedingly protracted and complex (ie costly).

Curiously, the most direct reference to fines being returned to the prosecutor is made in the Executive Summary to this paper, with the statement that fines “should not be considered a means of raising revenue”,<sup>143</sup> but this comment is not found (let alone expanded on) in the body of the text. Finally, s 342 is not mentioned in the explanatory note to the Resource Management Bill and does not appear to have been discussed in the Parliamentary debates.

These points, along with the fact that the “architect” of the RMA, Sir Geoffrey Palmer QC, has in recent years raised issues with the return of fines to local authorities,<sup>144</sup> suggests that it was not necessarily a conscious policy decision to include s 342. It is seemingly based (given the similarity in wording) on the provision it excludes from applying, s 73 of the Public Finance Act 1989,<sup>145</sup> and so perhaps the best explanation is that it was included by the drafters of the Resource Management Bill to rule out any uncertainty as to whether s 73 would apply.<sup>146</sup> Such uncertainty would arise because s 73 of the Public Finance Act 1989 is

---

<sup>141</sup> Resource Management Law Reform Core Group, above n 2, at 35.

<sup>142</sup> At 53.

<sup>143</sup> At 6.

<sup>144</sup> Geoffrey Palmer “Ruminations on the problems with the Resource Management Act - Part 2” [2016] New Zealand Law Journal 46 at 48.

<sup>145</sup> Section 73 provides:

**73 Payment of fines to local authorities and other organisations that conduct prosecutions**

(1) Subject to subsection (2) and any other provision of any Act, where a local authority, or other organisation (other than a department, an Office of Parliament, a Crown entity, a Schedule 4 organisation, or a Schedule 4A company) that is specifically empowered to do so by any Act, or any person on behalf thereof, prosecutes a person in a court of law in respect of an offence and the prosecution results in the imposition of a fine, the amount of the fine recovered shall be paid to the local authority or other organisation.

(2) There shall be deducted from every amount payable to a local authority or other organisation under subsection (1) a sum equal to 10% thereof, and this sum shall be credited to the Crown Bank Account or a Departmental Bank Account:

provided that, where any money awarded by a court in respect of any loss or damage is recovered as a fine, no deduction under this subsection shall be made in respect of that money.

<sup>146</sup> Section 73 of the Public Finance Act 1989 can be traced back to s 13 of the Finance (No 2) Act 1927, although at that time the Minister of Finance had to direct (either specifically or generally) that any fines recoverable go to the local authority (as opposed to the “specifically empowered” requirement), there was no proviso relating to “no deduction” and the Crown retained only 5%. The provision originally appeared to be focussed on driving offences and was subject to mixed views. For instance, one opposition Member of Parliament stated when the Finance (No 2) Bill was being read that ((2 December 1927) 216 NZPD at 732-733):

This problem requires further investigation on the part of the Government. There is an unseemly sort of wrangle between the local authorities and the Government as to who is to have the fines for prosecuting in respect of offences. We see that the fines imposed constitute an essential element of the revenue, and

only engaged where the local authority or other organisation is “specifically empowered” to prosecute by an Act, yet, as noted in Chapter 5, the only statutory instructions in the RMA regarding enforcement are the requirements that local authorities “enforce the observance” of their plans and any national environmental standards.<sup>147</sup>

The inclusion of s 342 is understandable, in one sense, in that it seems fair that fines are paid to the local authority that instituted the proceeding when it is that party which is responsible for the costs of prosecuting.<sup>148</sup> However, the problem with the provision, from an indicators of substantive criminality perspective, is that coupled with the emphasis placed on significant monetary penalties being imposed (by adopting high maximum penalties, and then raising these) it makes it look as though the purpose of the fines imposed is compensation for the investigation and prosecution costs of the local authority, rather than punishment.

Yet compensation for these costs is not typically associated with the imposition of penalties, and this is for good reason. As Horder has noted:<sup>149</sup>

Many of the significant costs of implementing regulatory penalties—the employment of officials, outlay in relation to any investigation and the making of findings, together with the costs of fine recovery and of conducting appeal hearings—must in fact commonly be borne by the state rather than by the offender. This is simply because it would be unduly harsh and out of proportion to make the wrongdoer bear all these costs, other than in exceptional cases. So, it is not strictly true to say that penalty schemes aim to ensure that, ‘costs of breaching regulations are borne by those who breach it,’ nor, in any legal system that aspires to do justice in a fair and proportionate way, should it ever be true.

---

there seems to be something essentially wrong in that. It does not inspire any respect for the law – in fact, it is inconsistent with any such respect on the part of those who drive motor in the street. For example, to get the impression that the fines imposed upon them are fines for more or less artificial, trivial, and ridiculous offences, and that they are imposed not so much because they are breaking the law, but to secure revenue, and that anything a motorist may do is made an excuse for bringing him to Court in order to produce revenue. That is the impression that has been created by the position disclosed in clause 13, and I submit to the Minister that he might seriously consider the question as to whether he can do something to relieve the situation, which I submit is scandalous, inasmuch as it breeds disrespect for the law.

<sup>147</sup> RMA, ss 84(1) and 44A(8), respectively. It can be observed that a number of statutes enacted after the RMA and that are primarily enforced by local authorities have similar provisions to s 342: see, for instance, Building Act 2004, s 389; Food Act 2014, s 275; Hazardous Substances and New Organisms Act 1996, s 118; Local Government Act 2002, s 180.

<sup>148</sup> See, for instance, the comments of Judge Kellar in the Hazardous Substances and New Organisms Act 1996 case of *Dunedin City Council v Duong* DC Dunedin CRI-2009-012-1496, 27 January 2010 at [37]. This point about responsibility for prosecution costs is returned to in section IIIC below.

<sup>149</sup> Jeremy Horder “Bureaucratic ‘Criminal’ Law: Too Much of a Bad Thing?” in RA Duff and others (eds) *Criminalization: the political morality of the criminal law* (Oxford University Press, Oxford, 2014) at 120. This was in response to Tadros’s theory that “penalties are aimed at ensuring that the costs of breaching regulations are borne by those who breach it rather than those that suffer from the breach”: see Victor Tadros “Criminalization and Regulation” in RA Duff and others (eds) *The Boundaries of the Criminal Law* (Oxford University Press, New York, 2010) at 174.

The matter is then compounded by the fact that there is no express prohibition in the RMA on insuring against fines, which has led the courts to recently declare that they have no power to declare an insurance policy against such void.<sup>150</sup> It is, perhaps, understandable that insurance was not discussed in the Resource Management Law Reform process, as it was not necessarily a live issue at the time. However, this does not explain why, when other statutes have been amended to prohibit such insurance,<sup>151</sup> no changes have been made to the RMA in this regard.<sup>152</sup> Ultimately, if an insurance company is paying the fine on behalf of the defendant then it is hardly a punishment, but rather a further indication that what is most important is that the fine is in fact paid (as without insurance the fine may not be paid or heavily reduced, pursuant to s 40 of the Sentencing Act 2002, if the defendant is impecunious) so that the local authority can recover some of its costs.

The position under the RMA can be contrasted with that for fines imposed in central government regulatory prosecutions. Perhaps the most similar situation to the RMA, in terms of the number of prosecutions brought each year and the penalties involved, is the Health and Safety at Work Act 2015.<sup>153</sup> In these cases, fines are not returned to the prosecutor (except in the broad sense that Worksafe New Zealand is a Crown Entity,<sup>154</sup> and any fines paid in response to a prosecution it has brought are, therefore, property of the Crown),<sup>155</sup> with

---

<sup>150</sup> *Bay of Plenty Regional Council v Whitiakau Holdings Ltd* [2018] NZDC 3850 at [151]-[240]. See the discussion in Chapter 5.

<sup>151</sup> For instance, the Health and Safety in Employment Act 1992 was amended, on 5 May 2003, by the Health and Safety in Employment Amendment Act 2002, to include a provision (new section 56I) prohibiting insurance against fines or infringement fees under the Act.

<sup>152</sup> The matter has been raised from time to time – see, for instance, Ministry for the Environment *Compliance, monitoring and enforcement by local authorities under the Resource Management Act 1991* (2016) at 38-39 – but no changes have been made, and none have been proposed in this respect in the 2019 amendments: see Cabinet Paper, above n 75.

<sup>153</sup> In terms of the number of prosecutions brought, Worksafe NZ initiated 73 prosecutions in the 2016/17 year (see Worksafe New Zealand *Annual Report 2016-2017* (2017) at 42) compared to 71 prosecutions initiated for RMA offending (see Ministry for the Environment, above n 103), and in terms of the fines imposed the Health and Safety at Work Act 2015 offences have maximum penalties in the hundreds of thousands of dollars (and in the millions in some cases) and the prospect of imprisonment for individuals.

<sup>154</sup> Crown Entities Act 2004, s 7(1) and sch 1.

<sup>155</sup> How this happens is not entirely clear. One route starts with s 381(1) of the Criminal Procedure Act 2011, which provides that “[s]ection 208 of the Summary Proceedings Act 1957 applies to all...fines... payable on any proceedings commenced by the filing of a charging document”. Section 208 then provides that fines must reach a “trust account administered by the department for the time being responsible for the administration of this Act” (subs (2) and (3)). This may be held until it is paid to a person who is entitled to it or “into another Departmental Bank Account or a Crown Bank Account, in accordance with the Public Finance Act 1989” (subs (3)). The other route starts with s 221(1) of the District Courts Act 2016, which states that “[a] fee or fine payable in respect of proceedings in courts or before Judges must be paid into a Crown Bank Account or a Departmental Bank Account in accordance with the Public Finance Act 1989”. Both routes therefore refer to the Public Finance Act 1989, but this does not, however, provide any guidance as to when and in what circumstances it will be paid into another Departmental Bank Account or a Crown Bank Account, but by this point it would seem to be “public money” (as defined in s 2(1) of that Act) and therefore the “property of the Crown” (s 65U(1)).

provision instead made for the Court to “order the offender to pay to the regulator a sum that it thinks just and reasonable towards the costs of the prosecution (including the costs of investigating the offending and any associated costs).”<sup>156</sup> Insurance against fines is expressly prohibited.<sup>157</sup> This means that fines are clearly demarcated as punishment and costs awards are compensation for investigation and prosecution costs, and there is no financial incentive to prefer one prosecution over another, or one type of penalty over another.

This last point is important because, as noted in earlier chapters, fines are not the only penalty that can be imposed for RMA offending. The other primary options for individuals are imprisonment and other non-monetary sentences, and these are quintessentially criminal responses to an unlawful act.<sup>158</sup> The ability to imprison offenders had previously only been a feature of a limited number of resource management statutes,<sup>159</sup> but with the RMA it was now provided for in every case (along with other non-monetary sentences).<sup>160</sup>

The Resource Management Law Reform paper on “Enforcement and Compliance Issues in Resource Management” had made three relevant points about this. First, it was suggested that a maximum of three months’ imprisonment “often finds favour” with policy-makers because it does not give the defendant the right to elect trial by jury pursuant to s 66 of the Summary Proceedings Act 1957.<sup>161</sup> However, as can be seen, a maximum penalty of two years’ imprisonment was ultimately chosen.<sup>162</sup> Second, as noted in section IIIA2 above, it was suggested that if imprisonment was a sentencing option, it would need to be made clear

---

<sup>156</sup> Health and Safety at Work Act 2015, s 152(1). If this happens, the Costs in Criminal Cases Act 1967 is excluded from applying: see s 152(2). A similar provision to s 152(1) has been proposed for prosecutions brought by the Environment Protection Authority (Resource Management Amendment Bill 2019 (180-1), cl 66), with 10% of the fine going to a Crown Bank Account and the balance of the fine being credited to the local authority that the Environment Protection Authority was assisting (cl 64).

<sup>157</sup> Health and Safety at Work Act 2015, s 29.

<sup>158</sup> While imprisonment can be imposed for civil contempt, the Law Commission has noted that, since *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767, the difference between civil and criminal contempt are almost indistinguishable, and has recommended codifying criminal and civil contempt into one provision dealing with contempt for failing to comply with a court order: see Law Commission *Reforming the Law of Contempt of Court: A Modern Statute* (NZLC R140, 2017) at Chapter 5.

<sup>159</sup> See, for example, s 79 of the River Boards Act 1908; s 62 of the Toxic Substances Act 1979.

<sup>160</sup> The Court can also impose community work, pursuant to s 339(4) of the RMA, and supervision, intensive supervision, community detention and home detention pursuant to ss 45(1)(a), 54B(1)(a), 69B(1)(a) and 80A(1)(a) of the Sentencing Act 2002 (respectively).

<sup>161</sup> Resource Management Law Reform Core Group, above n 2, at 46. Section 66 of the Summary Proceedings Act 1957 has now been replaced by s 50 of the Criminal Procedure Act 2011, which gives the defendant the right to be tried by jury if he or she is charged with a category 3 offence, which is one that is punishable by a term of imprisonment for 2 years or more (s 6).

<sup>162</sup> It was discussed, in Chapter 6, how it seems that local authorities would prefer that a RMA defendant could not elect trial by jury.

what fault element was required.<sup>163</sup> Again, however, as also noted in that section the Government chose not to include a fault element for any of the one-step breaches (and the two-step breaches have been held to be strict liability offences). Finally, it was said that any “suggestion that imprisonment be available for serious criminal environmental offences is likely to be strongly resisted.”<sup>164</sup> This resistance, if it ever eventuated, was obviously unsuccessful.

However, as set out in Chapter 4, in practice imprisonment and the other non-monetary penalties are rarely used, meaning that such penalties do little to bolster the criminality of the RMA’s offences. The starting point is that no one was sentenced to imprisonment for RMA offending until 2004, some 13 years after the Act came into force. Interestingly, the first case where imprisonment was imposed – *R v Conway*<sup>165</sup> – reached the Court of Appeal and the importance of this penalty, at least compared to the other non-monetary sentences, was recognised:<sup>166</sup>

[66] If a sentence of imprisonment were not imposed potential offenders might well regard the economic risk of a fine, or the possible sanction of community work, as a risk worth taking to gain profit from illegal activities. A short sentence of imprisonment (as evidenced by Mr Conway’s appeal to us to impose community work) is much more likely to be regarded as a deterrent by the community than a sentence of community work.

However, notwithstanding these comments, by the end of 2017 there had only been three further cases where imprisonment was imposed (and none in the 5 years from 1 July 2012). Further, in two of these cases the defendant was already serving a term of imprisonment,<sup>167</sup> which essentially ruled out alternative options, and in the third it was Mr Conway who again offended.<sup>168</sup> While there was something of a renaissance in 2018, with two sentences of imprisonment imposed, these were on the same defendant and were for very serious,

<sup>163</sup> Resource Management Law Reform Core Group, above n 2, at 46.

<sup>164</sup> At 46.

<sup>165</sup> *R v Conway* [2005] DCR 243.

<sup>166</sup> *R v Conway* [2005] NZRMA 274 (CA).

<sup>167</sup> *R v Feeney* DC Hamilton CRI 2006-019-6265, 7 April 2008 and *Thames-Coromandel District Council v May* DC Auckland CRI-2008-004-7940, 5 June 2008.

<sup>168</sup> *R v Conway (No 2)* DC Auckland CRI-2008-004-19495, 18 December 2009 (appeal dismissed: *Conway v R* [2013] NZCA 438, [2013] NZRMA 461; leave to appeal declined: *Conway v R* [2013] NZSC 103, [2013] NZRMA 479).

repetitive, offending, which suggests it was more likely an outlier than a change in direction.<sup>169</sup>

It cannot be said that the other non-monetary sentences have been used instead. For instance, as noted in Chapter 4, between 2012/2013 and 2016/2017 only two people were sentenced to home detention, six people were sentenced to community detention and 11 people were sentenced to community work, out of 413 defendants.<sup>170</sup> It must, of course, be observed that a good proportion of those convicted – likely around a half – will be non-natural persons,<sup>171</sup> and so imprisonment and the other non-monetary sentences were not available, but even taking this into account these sentences are infrequent.

Indeed, this preference by local authorities for non-natural person defendants is part of the problem, given the lack of available alternatives to a fine when sentencing them, but unsurprising given the splitting (and raising) of the maximum monetary penalty in 2009. This is because the implicit message to local authorities from providing a higher maximum monetary penalty for non-natural persons is that the focus should be on companies, as the recovery will be greater than if they proceed against an individual. The maximum penalty was, apparently, split “to reflect ability to pay and likely commercial motives”, but there was no evidence provided to support the proposition that in RMA cases a non-natural person has a greater ability to pay or is more likely to have a commercial motive than a natural person.<sup>172</sup> While this may be the case in some situations, one can equally identify examples of the opposite – for instance, a charitable trust may have far fewer resources and a more benevolent motivation than many sole traders. Even taking (probably) the most prevalent type of prosecution, that of a dairy farm owner, whether this is operated by a small family-owned company or a husband and wife partnership, both their ability to pay and their motive is likely to be the same. The only place where a higher maximum penalty for non-natural persons may make sense is to enable local authorities to deal with very large corporations, but

---

<sup>169</sup> See *R v Lau* [2018] NZDC 1133 (appeal against sentence dismissed: *Lau v R* [2018] NZCA 151) and *R v Lau* DC Auckland CRI-2006-004-010786, 10 July 2018 (appeal against sentence dismissed: *R v Lau* [2018] NZHC 2935).

<sup>170</sup> Letter from Ministry of Justice to Mark Wright regarding Official Information Act 1982 request (23 February 2018) at Appendix 1. Indeed, no offenders were sentenced to community-based sentences or home detention in 2016/2017.

<sup>171</sup> In the analysis of the sentencing decisions for 2016/2017 conducted, out of the 59 defendants 32 were non-natural persons (54%) and 27 were natural persons (46%).

<sup>172</sup> Cabinet Paper, above n 138, at 26. It has also been suggested that different corporate and individual maximum penalties can reflect “the fact that corporations cannot be sent to gaol and is the price of avoiding this punishment”: Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC R95, 2002) at 811.

these are not prevalent in New Zealand.<sup>173</sup> Further, if this was (part of) the rationale then it has likely not worked – for instance, in *Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd* a fine of \$288,000 was imposed (from a starting point of \$360,000, uplifted to \$480,000 on account of the wealth and size of the defendant and then reduced to take into account the proactive measures taken and its guilty plea),<sup>174</sup> but this pales in comparison to the US\$16.2b the defendant’s parent company earned that year.<sup>175</sup>

In summary, while once successful prosecutions were resolved by the practice of paying compensation to the person bringing the case, this was abolished hundreds of years ago and replaced with the payment of fines to the Crown.<sup>176</sup> Further, in terms of these fines, it has traditionally been considered unlawful to insure against them, on the basis that this would be contrary to public policy.<sup>177</sup> However, the RMA does not follow these positions. The vast majority of any fine imposed goes to the party that initiated the proceeding, in what appears to be compensation for the “damage” it has suffered (by way of having to pay investigation and prosecution costs), and insurance against these fines is not prohibited, seemingly to ensure that this compensation is in fact paid. Such responses to offending are distinctly non-criminal, and have become the focus on RMA sentencing over the quintessentially criminal responses of imprisonment and other non-monetary penalties.<sup>178</sup> Indeed, the most recent change to the sanctioning regime, increasing the maximum monetary penalty and splitting it so that it is twice as high for non-natural persons, has only served to reinforce this.

## 2 *Convictions convey no adverse moral judgment*

There is, however, one distinctly criminal response to offending that generally cannot be avoided, and that is the conviction. As noted in Chapter 4, a conviction is generally considered to be a penalty, quite apart from any other sentence imposed, because it labels the

<sup>173</sup> For instance, 97% of enterprises in New Zealand have fewer than 20 employees: see Ministry of Business Innovation & Employment *Small Businesses in New Zealand* (June 2017).

<sup>174</sup> *Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd* [2016] NZDC 8903.

<sup>175</sup> Bay of Plenty Regional Council “*Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd* - Agreed Summary of Facts” (2016) Bay of Plenty Regional Council <www.boprc.govt.nz> at [2].

<sup>176</sup> Klerman suggests this may have happened as early as the late tenth century: Daniel Klerman “Settlement and the Decline of Private Prosecution in Thirteenth-Century England” (2001) 19(1) *Law and History Review* 1 at 6. See generally Gary Slapper *Organisational Prosecutions* (Routledge, London, 2018) at Chapter 2.

<sup>177</sup> See the discussion in Chapter 5.

<sup>178</sup> The courts can also, on sentencing, make an enforcement order under s 314 of the Act and/or (since 2009) an “order requiring a consent authority to serve notice, under section 128(2), of the review of a resource consent held by the person, but only if the offence involves an act or omission that contravenes the consent”, but such penalties are typically secondary. However, it can be observed that, when these are imposed, as noted in Chapter 4 they are more frequently the “compliance-focussed” enforcement order, which is more akin to a non-criminal response to a breach, rather than “punitive” enforcement order or the resource consent review (that can lead to the cancellation of a resource consent).



defendant as a “criminal”.<sup>179</sup> By saying “X is a murderer”, and all the connotations that come with this, this is in fact shorthand for saying “X is a *convicted* murderer”. In the usual course, this invites the community to make an adverse moral judgment about the defendant’s character – as Simester and Von Hirsch note, “[t]he very labelling of a defendant as ‘criminal’ imports all the resonance and meaning of that term – quite different from publicly calling her a ‘tortfeasor’ (!),”<sup>180</sup>

However, the courts have, for the most part, suggested that a RMA conviction says little about the defendant’s character. For instance, in the 2008 sentencing decision of *North Shore City Council v Aislabie*, Judge McElrea stated, when considering an application for a discharge without conviction on RMA charges, that:<sup>181</sup>

[67] There is no evidence for example, that there is any question wider than one relating to criminal convictions - and *this type of regulatory offence is not a crime*. There is no evidence that there is any bar or any discretion exercised in relation to offences of this type. The same comment applies in relation to being a marriage celebrant. Indeed, I would be most surprised if *a conviction* for cutting down a tree or trees without consent under the RMA would operate as any bar in that way. It *does not cast a slur on the moral integrity of Mr Aislabie*.

More recently (in August 2016), Judge Thompson in the sentencing decision of *Taranaki Regional Council v Collingwood* was continuing to promote a similar position when considering an application by one of the defendants for a discharge without conviction:<sup>182</sup>

[20] It is to be borne in mind, I say finally, on that point that convictions for offences under the Resource Management Act do not carry overtones of dishonesty or immorality or violence. *They are regulatory offences, and on this occasion I am afraid Mr Collingwood has lapsed and that is that*.

It can be observed that, in 2018, Judge Harland was putting forward a contrary position, in the sentencing decision of *Bay of Plenty Regional Council v Whitikau Holdings Ltd*, that while “arguably environmental offending was historically seen as more ‘regulatory

<sup>179</sup> Simester and others, above n 136, at 5.

<sup>180</sup> AP Simester and Andreas Von Hirsch *Crimes, harms, and wrongs: on the principles of criminalisation* (Hart Publishing, Oxford, 2011) at 5.

<sup>181</sup> *North Shore City Council v Aislabie* DC Auckland CRI-2008-044-003188, 14 October 2008 (emphasis added).

<sup>182</sup> *Taranaki Regional Council v Collingwood* [2016] NZDC 16616 (emphasis added). Judge Thompson has made similar comments about RMA charges being regulatory offences in, for example, *Wellington City Council v Patel* [2017] NZDC 6771 at [14] and *Northland Regional Council v Beejay Stud Ltd* DC Whangarei CRI-2016-088-759-760, 26 October 2016 at [8].

offending’, or as Moore DCJ said in *Gubb[s] Motors* ‘statutory breaches’ rather than truly ‘criminal’<sup>183</sup> it is:<sup>184</sup>

... worth exploring this issue a little further, and offering the idea that this distinction is no longer as valid as it once may have been. This is because there is more understanding these days of the impact environmental offending can have on human activity, health and wellbeing, particularly if one takes a longer term and intergenerational view. As well, classifying these offences in this way has the effect of minimising them, and ignoring the maximum penalties provided for such offending by Parliament, and the fact that these are not civil or pecuniary penalties.

However, in this same judgment Judge Harland felt compelled to allow the fines to be insured against, which as noted above, is a distinctly non-criminal response, and Her Honour accepted that the impact of a conviction will be variable.<sup>185</sup> Since that case the regulatory nature of RMA offending has been emphasised by the High Court, with Whata J starting in *R v Lau* that:<sup>186</sup>

...The present offending is not like violent offending as Mr Symon submits. The requirement for denunciation and deterrence is not the same, as the maximum sentences for violent offending clearly show. *It is necessary to keep this firmly in mind when dealing with regulatory breaches of the present kind.*

Or as Brewer J put it, when considering an appeal against a refusal to grant a discharge without conviction in *Bay of Plenty Regional Council v Withington*:<sup>187</sup>

*First, I shine the light of reality on the situation. Mr Withington pleaded guilty to a charge under the Resource Management Act. He has not lied, cheated, defrauded, been violent or depraved.* He cleared a channel and this had an adverse effect on the foreshore. In all the circumstances, including his personal circumstances, he was convicted and discharged without further penalty.

The message therefore sent by the courts when sentencing offenders, by and large, is that the offending is “only regulatory”, and convictions carry no adverse moral judgment. Convictions are, rather, simply what enables the Court to impose a compensatory penalty.<sup>188</sup> As such, this subsection has shown that what is missing in the RMA are the “two central functions” of the criminal law, the condemnation from the conviction and punishment.<sup>189</sup>

---

<sup>183</sup> *Auckland Regional Council v Gubbs Motors Ltd* DC Auckland CRN-08088500246/08084500006, 20 March 2009.

<sup>184</sup> *Bay of Plenty Regional Council v Whitiakau Holdings Ltd*, above n 150, at [217]-[218].

<sup>185</sup> At [230].

<sup>186</sup> *R v Lau*, above n 169, at [34] (emphasis added).

<sup>187</sup> *Withington v Bay of Plenty Regional Council* [2018] NZHC 1237 at [26] (emphasis added).

<sup>188</sup> If a defendant is discharged without conviction no other sentence is imposed, but the court may make an order for costs, reparation or “any order that the court is required to make on conviction”: Sentencing Act 2002, s 106(3).

<sup>189</sup> Tadros, above n 149, at 164-165.

### *C Institutional Arrangements*

By taking an expansive approach to the offences and focussing penalties on compensating local authorities, prosecuting *could* be made easier and more worthwhile, but what was also required to ensure this happened was the creation of a receptive institutional environment. The Government achieved this in two ways. First, no restrictions were placed on how local authorities could undertake RMA prosecutions. Second, it was decided that Environment Judges, as opposed to generally warranted District Court Judges, would hear the cases. However, these institutional moves have meant that, like the offences and penalties, the prosecutions that are undertaken lack many of the indicators of substantive criminality that one would typically expect to see. Prosecutions are defined as neither “private” nor “public”, the lawyers engaged sometimes only undertake RMA (or more generally local authority) prosecutions and charge private rates to do so, and the Judges are more commonly associated with their civil work and tend to manage cases accordingly.

#### *1 Prosecutions neither “private” nor “public”*

There was limited mention of who would be primarily responsible for prosecuting RMA offences, and how this would be done, during the Resource Management Law Reform process. For instance, the working paper on “Enforcement and Compliance Issues in Resource Management” simply stated that:<sup>190</sup>

Some issues arising out of legislation include:

Who can prosecute? Under S.13 of the Summary Proceedings Act generally can "lay an information". In other Acts, there are specified exemptions where only particular people can lay charges. (Generally some wrong needs to be done to them but the degree of effect varies).

The Clean Air Act is enforced by the local authority but some prosecutions need an officer appointed or the leave of the Director-General Health. Under the Water and Soil Conservation Act anyone can prosecute, but only the Board can request an injunction pursuant to S.34(6).

This was, probably, a reflection on the fact that the responsibilities for implementing (and so enforcing) the new legislation were still being resolved when this working paper was issued. However, even when the Act was passed it was never explicitly stated that it was the role of local authorities to undertake prosecutions – as mentioned in both Chapter 5 and Section IIIB1 above, the only indication that this is the case is the somewhat ambiguous requirement that “[w]hile a policy statement or a plan is operative, the regional council or territorial

---

<sup>190</sup> Resource Management Law Reform Core Group, above n 2, at 38.

authority concerned, and every consent authority, shall observe and, to the extent of its authority, enforce the observance of the policy statement or plan”.<sup>191</sup> Section 342 arguably provides the clearest indication that local authorities will be undertaking prosecutions,<sup>192</sup> but this could equally be read as simply recording what is to happen if they do prosecute (rather than a responsibility to do so).

This is important because local authority prosecutions, in general, have never been adequately assimilated into the criminal law infrastructure. For instance, when the Law Commission considered criminal prosecutions in the late 1990s, it gave only brief mention to charges brought by local authorities in its preliminary paper, treating them as “private prosecutions” and associating them with prosecutions brought by private agencies:<sup>193</sup>

Summary prosecutions are sometimes brought by private agencies such as local authorities – the Society for the Prevention of Cruelty to Animals, the Real Estate Institute of New Zealand, and the Licensed Motor Vehicle Dealers Institute – but rarely by private citizens. Private agencies are often recognised or established by statute and either have the responsibility for the enforcement of particular enactments or have assumed it.

The Law Commission then essentially dismissed such prosecutions, by observing that the “offences [that private agencies] charge are, on the whole, very minor” and that “the private prosecution of indictable offences remains almost unknown in New Zealand”.<sup>194</sup> In its final report on Criminal Prosecution, the Law Commission much more explicitly classified local authorities as private prosecutors, and separated these out from the other “private agencies”, but it then observed (in a footnote) that they may be “characterised in another sense as public not private, despite not using the police or Crown solicitors, as their overall function is public”.<sup>195</sup>

This uncertainty over whether local authority prosecutions are public or private carried over to the Criminal Procedure Act 2011. The starting point is that local authority prosecutions are explicitly excluded, in s 5 of the Act, from the definition of a “private prosecution”. This is probably so that the checks on private prosecutors, such as on the filing of charging

---

<sup>191</sup> RMA, s 84(1). See also s 44A(8), which requires every local authority and consent authority to “enforce the observance of national environmental standards to the extent to which their powers enable them to do so”.

<sup>192</sup> See the discussion of s 342 in section IIIB1 above.

<sup>193</sup> Law Commission *Criminal Prosecution* (NZLC PP28, 1998) at 30.

<sup>194</sup> At 30.

<sup>195</sup> Law Commission *Criminal Prosecution* (NZLC R66, 2000) at 92, citing Andrew Butler “Is This a Public Law Case?” in New Zealand Law Society *Public Law Update on Administrative Law and Judicial Review* (1998) 98.

documents, do not apply.<sup>196</sup> However, local authority prosecutions are also not “public prosecutions”. This is because s 5 of the Act defines these as “a proceeding in respect of an offence that is commenced by or on behalf of the Crown, and includes a proceeding in respect of an offence that is commenced by or on behalf of a Crown entity within the meaning of section 7 of the Crown Entities Act 2004”.<sup>197</sup> The main consequence of this is that local authority prosecutions do not come within the “general oversight” of the Solicitor-General,<sup>198</sup> and the Solicitor-General’s Prosecution Guidelines do not apply to local authorities.<sup>199</sup>

The fact that this is not simply a mistake, given that the classification of local authority prosecutions was obviously considered when determining the definition of “private prosecution”, suggests instead that such prosecutions are considered, from a criminal infrastructure standpoint, unimportant. Put another way, private prosecutions are generally considered “a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law.”<sup>200</sup> However, they can also be used problematically, for instance as a form of harassment, hence the need for restrictions on the filing of charging documents. On the other hand, public prosecutions reflect that it is a community that is generally responsible for punishing wrongdoing, but as a matter of fairness to defendants (and putative defendants) there must be some central oversight to ensure that such prosecutions are being conducted consistently. By not allocating local authority prosecutions to either category, the implication is that RMA prosecutions (and other local authority prosecutions) do not have a specific role in the criminal law landscape.

In a similar vein, because local authorities are not government departments, the Cabinet Directions for the Conduct of Crown Legal Business 2016 do not apply to them.<sup>201</sup> This means that, in addition to the Police not being involved, a local authority does not need to engage a firm headed by a Crown Solicitor to run its prosecutions, and can instead choose to be represented by in-house counsel, a private law firm or a barrister. By the same token,

---

<sup>196</sup> Section 26.

<sup>197</sup> For this reason, RMA prosecutions have been described as falling in “an opaque middle zone that requires clarification”: Marie Brown *Last Line of Defence: Compliance, monitoring and enforcement of New Zealand's environmental law* (Environmental Defence Society, Auckland, 2017) at 35.

<sup>198</sup> Criminal Procedure Act 2011, s 185.

<sup>199</sup> Crown Law Office *Solicitor-General's Prosecution Guidelines* (2013).

<sup>200</sup> *Gouriet v Union of Post Office Workers* [1978] AC 435 at 498.

<sup>201</sup> Cabinet Office Circular “Cabinet Directions for the Conduct of Crown Legal Business 2016” (30 March 2016) CO (16)2 at Annex 1.

local authorities will be responsible for paying for this representation, and there is no restriction on the charging of market rates, even if a Crown Solicitor's office is engaged. There may well be practical benefits in local authorities having this choice, in that regular counsel may build up specific expertise in RMA prosecutions, but the impression, once again, is that local authority prosecutions do not fit into the usual criminal mould.

There are also practical problems with the combination of a lack of identification of local authority prosecutions as private or public and that local authorities can choose who they want to represent them in court. For instance, because a local authority prosecution is not a "private prosecution", a prosecution brought by a local authority will become a "Crown prosecution", and so be taken over by the local Crown Solicitor's firm, in two situations.<sup>202</sup> One is if the defendant elects to be tried by a jury,<sup>203</sup> and the other is if the Solicitor-General directs that, having regard to the particular features of the proceeding, it is appropriate that it be conducted as a Crown prosecution.<sup>204</sup> While the latter is rare, the former occurs from time to time (and the frequency seems to be increasing),<sup>205</sup> and it can potentially lead to confusion, or at least double-handling, if a local authority instructed a private law firm to act in first instance, only for the matter to be handed over to a Crown solicitor's firm after the election of a jury trial some months later.<sup>206</sup> Further, if the *defendant* has instructed the local Crown Solicitor's firm to act for it, on the basis that the local authority was prosecuting the matter itself or instructing a private law firm or barrister, and then elects trial by jury, this creates issues for who will act for the Crown. This occurred in *Greymouth Petroleum Limited v The Solicitor-General of New Zealand*, with the defendant unsuccessfully judicially reviewing decisions of the Solicitor-General to file an indictment against it, and to refuse to grant dispensation to the New Plymouth Crown Solicitor to continue to act as counsel at trial.<sup>207</sup>

---

<sup>202</sup> Pursuant to s 5 of the Act, a "Crown prosecution means a prosecution of a kind specified in regulations made under section 387 *other than a private prosecution*" (emphasis added).

<sup>203</sup> Crown Prosecution Regulations 2013, reg 4(1)(c).

<sup>204</sup> Regulation 4(1)(e).

<sup>205</sup> See the discussion in Bay of Plenty Regional Council 2016/2017 *Regulatory Compliance Report* (2017) at 54.

<sup>206</sup> The Solicitor-General's Prosecution Guidelines will then also apply and "all decisions in relation to disclosure, the charges filed, the evidence to be adduced, the conduct of the prosecution and the nature and scope of any continuing investigation (where it is probable that will result in evidence or information relevant to the trial) are matters solely for the Crown prosecutor to decide", although "Crown prosecutors are expected to consult closely with and take into account the views of the investigator or officer in charge of the case and to explain the basis of any significant decision": Crown Law Office, above n 199, at 28.9 and 28.10.

<sup>207</sup> *Greymouth Petroleum Limited v The Solicitor-General of New Zealand* HC Wellington CIV-2009-485-1425, 25 February 2010.

In summary, RMA prosecutions can be considered *sui generis*. They are not private prosecutions, and so there is no enhanced regulation from the courts, but nor are they public prosecutions, and so the Solicitor-General does not provide oversight. The lawyers engaged may only undertake RMA (or more generally local authority) prosecutions, and the rates charged are a matter of private bargain. Indeed, as will be seen in the next section, the *sui generis* nature of RMA prosecutions extends to the Judges, who spend most of their time conducting civil hearings and do not appear to deal with any other criminal cases.

## 2 In a “non-criminal” setting

The other institutional aspect is how prosecutions are determined. It is, of course, the case that these are heard in the District Court, like most other criminal offending in New Zealand.<sup>208</sup> However, s 309(3)(b) of the RMA provides that, except where otherwise directed by the Chief District Court Judge, the prosecution will be heard by “a District Court Judge who is also an Environment Judge”. This was not a feature in the previous legislation, although it seems that, where possible, relevant cases were being referred to Planning Judges (as they were called then).<sup>209</sup> The Hearn report had recommended that criminal cases should be (solely) adjudicated by an Environment Judge,<sup>210</sup> and this was supported in the working paper on enforcement and compliance issues.<sup>211</sup> On the other hand, the recommendation from Dr Palmer in the Resource Management Disputes working paper, which the Ministry for the Environment did not appear to disagree with (although issues with it were raised), was that there should be concurrent jurisdiction between the District Court and the Planning Tribunal (judge sitting alone), with a power vested in the Chief Planning Judge to transfer a case from one to the other.<sup>212</sup> The outcome was probably the same, however, that Environment Judges, as opposed to “generally warranted” District Court judges, would typically hear the prosecutions, and this was what was enacted.

This is understandable given Environment Judges have specialist knowledge of environmental law and the RMA, but the problem with this, from an indicators of substantive criminality perspective, is that such Judges are more commonly associated with their civil work. For instance, Environment Judges are, first and foremost, part of the Environment

---

<sup>208</sup> The exception is the most serious offending, which is heard in the High Court: see s 9 of the Criminal Procedure Act 2011 for the jurisdiction of the District Court (and the concomitant jurisdiction of the High Court).

<sup>209</sup> Resource Management Law Reform Core Group, above n 47, at 33.

<sup>210</sup> Hearn, above n 34, at 106.

<sup>211</sup> Resource Management Law Reform Core Group, above n 2, at 58.

<sup>212</sup> Resource Management Law Reform Core Group, above n 47, at 34.

Court, with prosecutions falling into their “other” duties. This can, to an extent, be seen in the fact that for the year ended 30 June 2017, 453 cases were disposed of in the Environment Court,<sup>213</sup> while only 71 prosecutions were commenced (and the majority of these would have involved only administrative appearances or sentencing hearings, given how few cases go to trial).<sup>214</sup> More tellingly, perhaps, is that the Environment Judges’ Annual Review for 2017 devoted only two paragraphs in the 32 page report to RMA prosecutions, suggesting these are considered by the Judges to be a lesser part of their role.<sup>215</sup>

Further, when Environment Judges deal with RMA prosecutions, these are often not treated like “normal” criminal cases. For instance, RMA prosecutions, other than when they are first called before a registrar, are not dealt with in “general” lists, like most District Court criminal cases, but are given their own hearing and management. In hearings, Environment Judges at times take a more active role, for instance by trying to resolve (what they consider to be) questionable prosecutions,<sup>216</sup> or by suggesting uses for a fine in proceedings brought against a territorial authority.<sup>217</sup>

The most recent example of this can be seen in the aftermath of the decision that it is possible to insure against RMA fines, *Bay of Plenty Regional Council v Whitiakau Holdings Ltd*.<sup>218</sup> After this case, a practice developed whereby defendants were being asked by the courts if they carried insurance, and if so the matter was adjourned for the defendant to provide: confirmation as to the scope of the indemnity provided to the defendant under the policy; the amount of cover of any excess, and how the policy interprets that it is to apply; what the policy excludes that might be relevant to the particular offending upon which the sentence is to be based; and any other relevant conditions of cover that might be relevant to the assessment of culpability for the offending.<sup>219</sup> This is unusual for a typical criminal sentencing, where the relevant question is simply whether the defendant can pay a fine of the suggested level, and in *H & S Chisholm Farms Ltd v Waikato Regional Council* the High

---

<sup>213</sup> Registrar of the Environment Court *Report of the Registrar of the Environment Court for the 12 months ended 30 June 2017* (2017) at 9-10.

<sup>214</sup> Ministry for the Environment, above n 103. The number of prosecutions resolved would have been a better statistic, but this information does not appear to be kept.

<sup>215</sup> Environment Court of New Zealand *Annual Review Calendar Year 2017* (2017) at 10. The Annual Report of the Registrar of the Environment Court for 2017 mentioned RMA prosecutions in only one sentence in a 12 page report (Registrar of the Environment Court, above n 213, at 6), but this is understandable on the basis that the report is about the Environment Court, not Environment Judges.

<sup>216</sup> See, for instance, *Auckland Council v Liu* [2016] NZDC 14243 at [69].

<sup>217</sup> See, for instance, *Otago Regional Council v Queenstown Lakes District Council* [2017] NZDC 28767 at [26].

<sup>218</sup> *Bay of Plenty Regional Council v Whitiakau Holdings Ltd*, above n 150.

<sup>219</sup> Such enquiries were based on what was set out at [171]-[172].



Court held that such an enquiry about insurance must take place within the specific terms of the Sentencing Act 2002.<sup>220</sup> That is, the sentencing court must first be uncertain about the defendant's ability to pay any fine that may be ordered,<sup>221</sup> and only if so can it request a declaration as to financial capacity,<sup>222</sup> which can include information about insurance held against fines imposed under the RMA.<sup>223</sup>

This will greatly restrict the ability of the District Court to ask for insurance information, as it will frequently be the case that there is no issue as to the defendant's ability to pay a fine. For instance, even if the insurance company has not finally decided whether to accept cover then, so long as the defendant has sufficient resources of its own, it can confirm to the Court it can pay a fine of the level suggested and there should be no need to consider the matter further. The key point, though, is that this shows that Environment Judges tried to come up with a non-criminal way (enquiring into who exactly would be paying the fine) of resolving a non-criminal outcome of offending (insurable fines), but the criminal law (in the form of the Sentencing Act 2002) is not amenable to such use. Put another way, the focus of the provisions of the Sentencing Act is on whether the fine will be paid, not by whom, as it was probably never contemplated that insurance would be an issue it needed to address.

In summary, RMA prosecutions are being heard by judges that spend the majority of their time dealing with the civil work of the Environment Court, and the cases themselves are isolated from the general criminal law work undertaken in the District Court and seem to involve more active judicial involvement than one would typically expect. Indeed, RMA prosecutions are treated quite differently to even other regulatory offending, which is dealt with by generally warranted District Court judges in "criminal" lists. While this point is primarily one of perception – that hearings for RMA prosecutions do not look "criminal"<sup>224</sup> –

---

<sup>220</sup> *H & S Chisholm Farms Ltd v Waikato Regional Council* [2018] NZHC 1885.

<sup>221</sup> Section 41(2).

<sup>222</sup> Section 42.

<sup>223</sup> *H & S Chisholm Farms Ltd v Waikato Regional Council*, above n 220, at [29].

<sup>224</sup> Compare the decision to wear robes, after initially deciding not to, in the New South Wales Land and Environment Court, as explained in Mahla Pearlman, Chief Judge of the Land and Environment Court of New South Wales "The Land and Environment Court of New South Wales" (address given at the Royal Australian Planning Institute Congress, Sydney, 5 October 2000) at 4:

When the Court was established, a rule was promulgated that the judges would not robe. But as cases became more complex, and, more importantly, as the penalties for environmental offences became more severe, the judges felt that there was a need to reinforce the status of the Court as a superior court of record, especially in relation to environmental prosecutions. Accordingly, in 1998, the judges resolved to robe when sitting in cases in those classes of the Court's jurisdiction...

Walters and Westerhuis note that while "this may seem a superficial shift, this was a different strategy to emphasise the seriousness of environmental crime, following the more overt emphasis on prosecution of

it may be that this also explains why, as set out in Chapter 6, the courts seem reluctant to stop local authorities using the offences in a non-criminal way, except in the most extreme cases.

#### *IV Conclusion*

This chapter was about explaining why local authorities consider it acceptable to use the offences in an inappropriate way. In order to do so, however, it was necessary to first understand the rationale behind the RMA's offences, penalties and institutional arrangements, and it was observed that, in the previous resource management legislation, the offences, penalties and institutional arrangements varied markedly, but prosecutions were generally considered difficult and often resulted in low penalties. The conclusion from the Resource Management Law Reform process was that such issues needed to be fixed, but it was never explained how this would happen or the trade-offs that would be involved in doing so. Such matters were also not addressed when the Resource Management Bill was drafted and proceeded through Parliament. The end result was offences, penalties and institutional arrangements in the RMA, supported by interpretations from the courts, that focussed on making prosecution easier for local authorities and more worthwhile, but no limits have been placed on the pursuit of these goals.

This set the scene for the primary argument that local authorities consider it acceptable to use the offences in an inappropriate way because the offences, penalties and institutional arrangements are not, in substance, criminal. The offences go far beyond sanctioning only serious wrongdoing, they rarely result in quintessentially criminal penalties and convictions convey no adverse moral judgment. Further, the offences are dealt with, and penalties imposed, in an environment where prosecutions have no special oversight from the courts or Solicitor-General, and cases are heard separate to other criminal matters and managed accordingly. Put another way, the indicators of criminality that, together, announce to those applying the legislation (here, the local authorities) that they are dealing with the criminal law are lacking.

Indeed, it is no surprise that, as found in Chapter 6, the approach taken by councils is not only distinctly "non-criminal", but is in fact "civil", as the RMA's offences, penalties and institutional arrangements seem to be far more akin to those found with civil causes of action.

---

environmental crime a decade before": Reece Walters and Diane Westerhuis "Green crime and the role of environmental courts" (2013) 59(3) *Crime, Law and Social Change* 279 at 285.

The offences allow for a wide range of parties to potentially jointly cause a breach, intention is irrelevant and the defendant has to disclose and prove his or her defence. A successful case typically results in a morally neutral monetary penalty returned to the party bringing the proceeding and which can be insured against. Finally, this all takes place in a system where the initiator can instruct (and pays for) its counsel of choice and the matter is heard by Judges who spend most of their time doing non-criminal work.

This concludes the critique of the RMA's offences. In the final chapter, the main points from this thesis are brought together, it is explained why the changes that are underway, and proposed, will miss the mark, and a way forward is suggested.

## Chapter 8 – Conclusion

---

### *I Answering the Research Question*

This thesis has shown that the RMA's offences are not working, as they are neither effective nor being used by the local authorities appropriately. In terms of effectiveness, despite the primary purpose of the RMA's offences being typically said to be deterrence, it is unlikely that would-be offenders are being deterred.<sup>1</sup> This is because the penalties imposed pursuant to the offences are of only moderate severity and there is a low certainty that such a penalty will be imposed in response to a RMA breach (the more important of the two factors). Together, this gives the offences a minimal expected cost and so it would only take a correspondingly low expected benefit from breaching the RMA for a rational regulatee to offend. In terms of appropriateness, the approach taken by local authorities to the offences – what has been termed in this thesis the “reparative gloss” – has led, from a criminal law perspective, to problematic behaviour.<sup>2</sup> Local authorities avoid prosecuting s 9 breaches, plea bargain cases that are brought in order to achieve guilty pleas and agreed summaries of facts by (preferentially) corporate defendants, and divert cases out of court where the defendant has repaired the damage and/or reimbursed the council for the cost. However, achieving such outcomes can involve, at times, the unequal treatment of regulatees, unprincipled actions and unlawfulness.

This chapter starts by drawing together the main findings of this thesis (section II). Section III then outlines why this research is important, with a focus on why the current and proposed changes to RMA enforcement will not resolve the issues that have been identified. Section IV ends this thesis by suggesting that the way that serious non-compliance with the RMA is dealt with needs to be considered afresh, with the goals to be decided first and the tools and institutional arrangements developed next. In particular, if deterrence is to remain the primary goal, the question to be asked is what role – if any – the criminal law should play.

### *II A Formally Criminal, but Substantively Civil, System*

The research question was about whether the RMA's offences are, or as it transpires are not, working, but implicit in this was the more important question “why”, as it is only once this is

---

<sup>1</sup> See Chapter 4.

<sup>2</sup> See Chapter 6.

understood that the mistakes that have been made can be avoided in the future. Fundamentally, the reason that the offences are not working is because they, along with the penalties and institutional arrangements for hearing prosecutions, are formally criminal but in substance civil. The civil substance has led local authorities to act inappropriately and ineffectively, while the formal criminality has prevented the courts and the public from stopping or solving these problems. The confused system has also led to a lack of accountability, with the Solicitor-General having no oversight and the Ministry for the Environment doing little to monitor the actions of local authorities. Each of these points is elaborated on in this section.

This thesis began with Judge Smith's comment in *Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd* that, because the fine imposed in that case would not be enough to meet the prosecutor's costs, "there may need to be some review of the legislation in due course to take into account that these costs are otherwise borne by the rate payers [sic] through no cause of their own".<sup>3</sup> Given the conclusion from this thesis that the offences are not working, Judge Smith was right that a review of the legislation is required, but the problem identified in this section is likely to be different to what he had in mind. Few people would disagree with the sentiment that ratepayers should not have to pay the costs of prosecuting those who, for instance, pollute sensitive waterways. However, by the same token, nor should taxpayers have to pay the costs of prosecuting murderers and arsonists, yet it has never been suggested that the Crimes Act 1961 be reviewed on this basis. The community pays for alleged murderers and arsonists to be prosecuted, and expects no reimbursement of this cost, because the criminal law is concerned with punishing wrongdoers not compensating prosecutors. If the offences in the RMA are criminal, then surely the same must be the case here?

Therein lies the problem. The RMA's offences are formally criminal. Cases are commenced by the filing of a charging document under the Criminal Procedure Act 2011, with a summons then served on the defendant. After a series of initial appearances in court, and the prosecution has disclosed its relevant documents under the Criminal Disclosure Act 2008, the defendant enters a plea. If it is not guilty, the matter proceeds to a hearing, either before a Judge alone or before a jury, where the prosecution bears the onus of proving the charge(s) beyond reasonable doubt. If the plea is guilty, or the defendant is found guilty, he or she is (typically) convicted and sentenced in accordance with the Sentencing Act 2002, with the

---

<sup>3</sup> *Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd* [2016] NZDC 8903 at [59]-[60].

prospect of an award of costs to the prosecutor in accordance with the Costs in Criminal Cases Act 1967 (and its accompanying regulations).

But in substance, there are few indicators of criminality in the offences, penalties or institutional arrangements for determining prosecutions.<sup>4</sup> The offences go far beyond sanctioning only serious wrongdoing, with harmful and non-harmful and culpable and non-culpable breaches covered, they rarely result in quintessentially criminal penalties and convictions convey no adverse moral judgment. Further, the offences are dealt with, and penalties imposed, in an environment where prosecutions are neither of the usual categories of “public” or “private”, and cases are heard separate to all other criminal matters.

Indeed, the RMA’s offences, penalties and institutional arrangements for hearing prosecutions not only lack substantive criminality, they are more akin to those associated with civil causes of action. The offences allow for a wide range of parties to jointly cause a breach, intention is irrelevant to liability and the defendant has to disclose and prove his or her defence. A successful case typically results in a morally neutral monetary penalty being returned to the party bringing the proceeding and which can be insured against. Finally, this all takes place in a system where the initiator instructs (and pays for) its counsel of choice and the matter is heard by Judges who spend most of their time doing non-criminal work. It will be recalled that during the Resource Management Law Reform process it was suggested, as part of the “Government’s Proposals for Resource Management Law Reform”, that individuals have a greater role in seeking compliance with the Act, with options including allowing persons to apply to the Planning Tribunal with respect to “environmental civil prosecutions”.<sup>5</sup> It was never explained what this meant, and in Chapter 7 the observation was made that it was oxymoronic. However, what can be seen is that “environmental civil prosecutions” have in fact become the reality, and this is the fundamental reason why the offences are not working.

The civil substance of the offences, penalties and institutional arrangements is what has encouraged local authorities to adopt the reparative gloss to the offences, whereby what is most important is that any damage caused by the defendant is remedied (or the issue that led to the non-compliance is fixed) and the council recovers as much of its costs incurred as it can. Such an approach may well be leading to outcomes that are in accordance with the goals

---

<sup>4</sup> See Chapter 7.

<sup>5</sup> Ministry for the Environment *People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform* (December 1988) at 62.

of environmental law, and in particular the polluter pays principle,<sup>6</sup> but it is leading to inappropriate behaviour, as it favours individual “bargains” over rule of law values such as certainty and equality of treatment. It also means that, when coupled with the “regulatory orthodoxy” in compliance and enforcement theory of prosecuting sparingly, it contributes to the offences being ineffective, as both the severity of the penalties and the certainty that they will be imposed are restricted.<sup>7</sup>

By contrast, the formal criminality has meant that the courts and the public have struggled to increase the effectiveness of the offences. Criminal law orthodoxy (as enshrined in the Sentencing Act 2002) dictates that the emphasis in sentencing is on desert over deterrence, which limits the severity of sanctions in cases (like those typically found in the RMA) where culpability is uncertain and penalty levels started out at a low base point, and no allowance can be made for the fact that prosecutions are brought infrequently. Similarly, while there is provision to increase sentences for repeat offenders, which is suitable in Police prosecutions where the relevant history of transgressing can be found in the defendant’s list of previous convictions, it is not designed to handle situations where offenders are coming to court for the first time but have a litany of lower level enforcement measures against their name. More likely, the defendants will receive a number of discounts off the starting point.

In a similar vein, because the offences are formally “criminal” the public has been unable to increase the certainty that a penalty will be imposed. In general, prosecuting is expensive and time-consuming, and beyond the abilities of most people. But this is not helped in the RMA by the public being unable to access the evidence gathered by local authorities and that the cost recovery provisions in s 342 are restricted to councils. The public’s role has been relegated to making complaints, but, as was seen in Chapter 4, even then there is no guarantee that these will be followed up by the relevant local authority.

While the courts have the ability to regulate (some of) the behaviour of councils, their powers are limited because the criminal justice system relies so heavily on prosecutorial discretion, which is particularly wide in RMA matters. Self-evidently, the courts have no involvement in cases that are not commenced and, where charges are brought, so long as “someone is pleading guilty to something” the courts are unlikely to intervene in the arrangements that local authorities have reached with defendants. Similarly, the courts have (at least until

---

<sup>6</sup> See Chapter 2.

<sup>7</sup> See Chapter 5.

recently) been content to let local authorities resolve cases out of court, by way of diversionary arrangements, on the basis that the prosecutor is best-placed to determine whether it is in the public interest that a prosecution continues.

Opportunities for the public to hold local authorities to account are also rare. The public is only told the “good news” that defendant A has been convicted and fined X dollars, with no mention of all the defendants and charges that were withdrawn in a plea bargain to get the conviction of defendant A. Nor is there any reference to the offenders who were only warned or given low level enforcement responses, or the diversionary arrangements (especially informal ones) that allowed offenders to avoid a conviction in return for doing certain acts or paying a sum of money. Such information gaps could be filled by the courts, to an extent, in their sentencing decisions, but when a judgment is published (and many are not) there is often no mention of the original defendants and the charges against whom the local authority originally proceeded, and how the matter was resolved. If a formal diversionary arrangement is completed, there is often no publicly issued court record of this at all.

Finally, the formally criminal, but in substance civil, arrangements have meant that no person or body has taken overall responsibility for holding local authorities to account. Because RMA cases are not “public prosecutions”, the oversight of the Solicitor-General does not apply. But the Ministry for the Environment has also shown little interest in regulating the use of the offences by local authorities, seemingly because the offences are formally criminal.<sup>8</sup> The one published report by the Ministry on compliance, monitoring and enforcement, in 25 years of the RMA’s operation, made little comment about the offence’s effectiveness or appropriateness, devoting only a little over a page (out of 44 pages) specifically to prosecutions.<sup>9</sup> No comment was made on the deterrent impact (of lack thereof) of only prosecuting 97 times in 2014/2015 out of 3,456 enforcement actions (in addition to all of the informal actions and undetected breaches),<sup>10</sup> or what penalties were being imposed (indeed, the focus was on the costs of prosecuting and that fines do not normally cover these costs). Nor was there any discussion about who is being prosecuted and

---

<sup>8</sup> The “Message from the Minister” in the 2018 Best Practice Guidelines for Compliance, Monitoring and Enforcement under the RMA can be recalled, whereby the focus is very much on the environmental, rather than criminal, aspect of enforcement: Ministry for the Environment *Best Practice Guidelines for Compliance, Monitoring and Enforcement under the Resource Management Act 1991* (2018) at 7.

<sup>9</sup> Ministry for the Environment *Compliance, monitoring and enforcement by local authorities under the Resource Management Act 1991* (2016).

<sup>10</sup> In fact, there were only 81 prosecutions that year: see Ministry for the Environment *National Monitoring System for 2014/15* (2016).



how. While the Ministry for the Environment has taken steps to improve the transparency of local authorities' operations with its National Monitoring System, this is only as good as the information it receives from local authorities – and there are clearly gaps with it – and its focus is purely on the number of prosecutions commenced. There is no breakdown of the number of defendants charged or how many (and what) charges they faced. At the same time, the Ministry has apparently decided not to publish any further prosecution studies, meaning that there is no nationwide reporting on the outcomes achieved.

In fairness to the Ministry, the task is not a simple one because there is a disconnect between rhetoric and reality in the way that local authorities act. Councils consistently refer to deterrence being the primary purpose of criminal sanctioning, as though it will automatically happen if the Court just imposes a higher fine (which coincidentally results in greater recovery for the local authority), while at the same time shying away from more punitive penalties, failing to use the convictions or leverage prosecutions, and bringing cases infrequently. It is not suggested that this, or indeed the inappropriate use of the offences in general, is necessarily intentional. Local authorities want to prevent non-compliance, but because the offences have been sapped of any criminal substance and because councils do not have any particular affinity with prosecuting, they instead simply deal with the offences in a rational, cost versus benefit way, as one would expect a would-be civil litigant who is faced with internal and external pressures, and no accountability, to do when considering civil proceedings.

### *III The Changes Underway and Proposed Will Miss the Mark*

It will be recalled, from Chapter 1, that the previous research on RMA enforcement did not consider the effectiveness of the offences in isolation and it treated them as “just another state regulatory tool”, interchangeable with the other mechanisms.<sup>11</sup> Further, it concluded that any issues with prosecuting (to the extent the offences were considered as part of RMA enforcement generally) can be solved, other than by minor tinkering with the legislative provisions, by changing the *actions* of local authorities. As such, it is no surprise that it is at the behavioural level where changes have been, and are proposed to be, made, with no significant alterations suggested for the offences, penalties and institutional arrangements.

---

<sup>11</sup> See, in particular, Ministry for the Environment, above n 9, and Marie Brown *Last Line of Defence: Compliance, monitoring and enforcement of New Zealand's environmental law* (Environmental Defence Society, Auckland, 2017).

The findings in this thesis are important because they suggest that the changes currently underway, and proposed, to improve RMA enforcement will only help at the margins (if at all).

The first of these behavioural changes is the Ministry for the Environment's 2018 *Best Practice Guidelines for Compliance, Monitoring and Enforcement under the Resource Management Act 1991*.<sup>12</sup> These Guidelines, which have been referred to throughout this thesis, have the aim of providing "advice on how [the considerable discretion that councils have in fulfilling their statutory functions] should be exercised to achieve the purpose of the RMA".<sup>13</sup> The Guidelines cover, among other things, topics such as a "Strategic approach to achieving compliance", "Cost recovery and resourcing", "Enforcement decisions" and "Enforcement tools", and prosecution is referred to throughout.

However, there is no exhortation that the effectiveness of the offences be improved and no meaningful statements about ensuring that prosecution is used appropriately. For instance, it is said that the Solicitor-General's Prosecution Guidelines "need to be applied when making decisions about prosecutions",<sup>14</sup> but there is a lack of appreciation that the Evidential Test will nearly always be met (given how broadly the offences are drafted and have been interpreted) and the Public Interest Test is so wide that local authorities can justify prosecuting – or more likely not prosecuting – in nearly every case. Nor is there anything to suggest the Ministry will check that these tests are being applied in any event. Prosecution is referred to as the "most serious enforcement tool", and that it "should only be taken in cases of significant non-compliance",<sup>15</sup> which does not imply that local authorities should be increasing the certainty of criminal penalties. Indeed, by only saying that it is "best practice" for councils to take a prosecution if it is "warranted",<sup>16</sup> the Ministry is essentially acknowledging that this will not always be followed. Similarly, after stating that the Sentencing Act 2002 applies, which allows "the Court to issue a wider range of sentences", the Guidelines observe that "[i]n practice, the Courts rarely impose imprisonment; fines, enforcement order, and community work are the preferred sentencing options",<sup>17</sup> which is hardly an indication to local authorities that they should be seeking more severe penalties than they do currently.

---

<sup>12</sup> Ministry for the Environment, above n 8.

<sup>13</sup> At 9.

<sup>14</sup> At 70.

<sup>15</sup> At 93.

<sup>16</sup> At 40.

<sup>17</sup> At 97.

It may be that the Guidelines are not seeking to (significantly) change prosecution behaviour because they are so heavily influenced by local authorities and the materials that councils have published. Council staff were on the “panel of CME experts” that helped with the development of the Guidelines and staff from eight local authorities reviewed drafts of it.<sup>18</sup> Further, the “Principles” and “4Es approach” (Engage, Educate, Enable and Enforce) from the Regional Sector Strategic Compliance Framework 2016-2018 are adopted,<sup>19</sup> and initiatives undertaken by various councils, such as the non-statutory Advisory Notices issued by Greater Wellington Regional Council, are put forward as enforcement options for consideration.<sup>20</sup> This is understandable on the basis that the local authorities have first-hand experience as to what has worked (and what has not worked) for them, but it also means that the Guidelines could not be said to be an independent view on how compliance, monitoring and enforcement under the RMA should be performed. Put another way, local authorities are not going to advise the Ministry that enforcement should be undertaken in a different manner than that which they are currently using.

The problem with this is that, even worse than not improving the effectiveness of the offences or the appropriateness of their use, now local authorities have an “official” document to support their practice. An example of this is with the involvement of local authority chief executives in compliance, monitoring and enforcement decision-making. Brown’s research found that, in 21 councils, the decision to take a prosecution can only be made by the chief executive.<sup>21</sup> As she points out, this is potentially problematic given such persons are appointed by the elected council and so “may be subject to political and administrative pressures based on concern about maintaining wider stakeholder relationships (which enforcement action generally, or on the ‘wrong’ people may threaten)”.<sup>22</sup> However, given the involvement of local authorities in the development of the Ministry for the Environment’s Guidelines, it is no surprise that, after stating that it is “good practice for final enforcement decisions to be delegated to the regulatory manager or other suitable decision-maker in the council”, the Guidelines then retreat and say the practice of chief executives approving prosecutions “is acceptable, provided appropriate measures are in place to ensure a robust and transparent decision-making process”.<sup>23</sup> The matter then comes full circle, as the councils

---

<sup>18</sup> At 8.

<sup>19</sup> At 17-22.

<sup>20</sup> At 88.

<sup>21</sup> Brown, above n 11, at 47.

<sup>22</sup> At 48.

<sup>23</sup> Ministry for the Environment, above n 8, at 82.

that continue to use their chief executive as the final sign-off for prosecutions then go on to cite the Guidelines in support of this.<sup>24</sup>

The second behavioural change is that, at the end of 2019, moves were made to assist compliance, monitoring and enforcement by local authorities with the introduction and first reading of the Resource Management Amendment Bill 2019.<sup>25</sup> Among other things, this Bill will enable the Environmental Protection Authority to take enforcement action under the RMA “to enhance accountability and provide support for those currently responsible for RMA enforcement”.<sup>26</sup> In particular, the Environmental Protection Authority may “if satisfied that the performance of the [enforcement] function is necessary or desirable to promote the purpose of [the RMA]”, take enforcement action, assist the local authority with enforcement action or intervene in an enforcement action of a local authority by taking it over, with enforcement action including inspections, investigations and other activity carried out in accordance with the RMA, as well as the formal responses including prosecution.<sup>27</sup>

However, this will only lead to improved accountability in limited circumstances. For instance, it would appear that the Environmental Protection Authority will not be able to intervene if the local authority has already “executed” the enforcement action, the meaning of which is unclear but on one reading suggests that there will be little the Authority can do if the council has already used a lower level response to offending.<sup>28</sup> This would be a major problem, as a common complaint is often not that a local authority has taken no action (in which case the Environmental Protection Authority could still intervene, so long as it is within the limitation period), but that the local authority has been too lenient (for instance, issuing an infringement notice when the matter warranted prosecution). Further, the Environmental Protection Authority will need to be aware that nothing has been done in response to an incident in order to be able to take enforcement action or intervene and, while it can require information from a local authority, this provision will be of little use if it does not know about the incident in the first place.<sup>29</sup> This is of critical importance because, as has been noted on many occasions in previous chapters, reporting on breaches of the Act and informal action that has been taken is typically infrequent.

---

<sup>24</sup> See Local Government New Zealand “Independent report on regional council compliance, monitoring and enforcement” (press release, 30 May 2019).

<sup>25</sup> Resource Management Amendment Bill 2019 (180-1).

<sup>26</sup> (explanatory note) at 4.

<sup>27</sup> Resource Management Amendment Bill 2019 (180-1), cl 66 (new ss 343E and 343F).

<sup>28</sup> New s 343G(2).

<sup>29</sup> New s 343J.

#### *IV A Way Forward*

If the work that has been undertaken, and is proposed, is unlikely to make the offences more effective and be used appropriately, can anything be done to make the offences work? This thesis suggests that it is unlikely that even substantive changes to the current arrangements will be enough. For example, it might be thought that local authorities could be encouraged to apply the offences (more) appropriately by repealing s 342 of the RMA (and making it explicit that the similar provision in the Public Finance Act 1989 did not apply). This would mean that local authorities would no longer receive (at least) 90% of any fines imposed and so the focus on reparative outcomes would be reduced. However, given the cost of bringing charges is one of the main reasons why there are already so few prosecutions brought, and s 342 helps to defray some of this cost, it seems likely that repealing this provision would have the effect of further reducing the certainty – and so the effectiveness – of the offences.

Similarly, it could be suggested that the offences could be made more effective by a significant increase in the maximum fine.<sup>30</sup> This would, in all likelihood, flow through to sentencing starting points, and so the fines imposed (although not to the same extent as the legislative increase), thus increasing the severity of the offences. However, leaving to one side the point that it is certainty that should be the focus when it comes to improving effectiveness (as the stronger of the two variables and currently the lowest), the problem with this is that it would only encourage local authorities to target cases where the fines will be higher (at the expense of those with lower fines) and defendants that have the ability to pay significant fines (but who may not be the most culpable). As such, this would lead to the offences being used even more inappropriately.

The point is that the issues with the offences, penalties and institutional arrangements for hearing prosecutions are systemic and inter-related. There do not appear to be any obvious changes that would simultaneously improve the effectiveness of the offences and lead them to being applied more appropriately. The ultimate implication from this thesis, therefore, is that the way that serious non-compliance with the RMA is dealt with needs a complete rethink, and in the final paragraphs one approach is suggested.

In order to move forward, it is necessary to first take a step back to the reason that serious non-compliance with the RMA is sanctioned. If the primary goal continues to be deterrence

---

<sup>30</sup> This was, seemingly, the rationale behind the last increase in the maximum fine penalty in 2009: see Cabinet Paper *Reform of the Resource Management Act 1991: Phase One Proposals* (2009) and Resource Management (Simplifying and Streamlining) Amendment Act 2009.

then the question to be asked must be what role – if any – the criminal law should play in the future. As will be apparent from the first section of this chapter, the courts and the public were always going to struggle to achieve the goal of deterrence, as the criminal law makes it difficult for them to, respectively, increase the severity of penalties and the certainty that they will be imposed. But what is most telling is that even criminal offences, penalties and institutional arrangements that were drafted (and subsequently interpreted) to make prosecuting easier and more worthwhile have failed to motivate councils to regularly bring charges. This is of critical importance, because even if the severity of the penalties could be increased (and it is already the higher of the two factors) there are major issues with trying to use this to make up for a lack of certainty – in short, and as noted in Chapter 2, exemplary sentences will likely not, from a deterrence perspective, work, let alone be accepted by the community.

It is clear from the Resource Management Law Reform process that little consideration was given as to why the criminal law should be used in the RMA.<sup>31</sup> Rather, the words of Henry M Hart Jnr seem more apt:<sup>32</sup>

... The legislature simply wants certain things done and certain other things not done because it believes that the doing or the not doing of them will secure some ultimate social advantage, and not at all because it thinks the immediate conduct involved is either rightful or wrongful in itself. It employs the threat of criminal condemnation and punishment as an especially forceful way of saying that it really wants to be obeyed, or else simply from lack of imagination to think of a more appropriate sanction.

This is, to an extent, understandable on the basis that there were limited alternatives to the criminal law available at that time,<sup>33</sup> but this is no longer the case. In particular, the pecuniary penalty has emerged as a credible option for deterring high level breaches,<sup>34</sup> and it is used in a variety of regulatory regimes in New Zealand.<sup>35</sup> One line of enquiry, therefore, is whether a different – non-criminal – means of sanctioning serious breaches of the RMA should be employed.

---

<sup>31</sup> See Chapter 7.

<sup>32</sup> Henry M Hart Jnr “The Aims of the Criminal Law” (1958) 23(3) *Law and Contemporary Problems* 401 at 417.

<sup>33</sup> The other way of dealing with criminal offences then available, the infringement notice regime, was only introduced (in its current form) in 1987 (the same year as the Resource Management Law Reform process commenced) and it is not supposed to be used for serious non-compliance: see Law Commission *The Infringement System: A Framework for Reform* (NZLC SP16, 2005) at Chapter 1.

<sup>34</sup> See generally Law Commission *Civil Pecuniary Penalties* (NZLC IP33, 2012); Law Commission *Pecuniary Penalties: guidance for legislative design* (NZLC R133, 2014).

<sup>35</sup> For instance, the Biosecurity Act 1993, ss 154H-154L; the Financial Markets Conduct Act 2013, ss 489-493; and the Overseas Investment Act 2005, s 48.

It could be argued, however, that the criminal law is required for its socialising and educative role.<sup>36</sup> For instance, it might be said that declaring certain conduct to be criminal makes it clear that it is “wrong” to act in this way and will drive internal change. However, to the extent this is correct, such a role is undermined when the criminal law is employed as liberally, and applied as irregularly, as it is now. This suggests that, if the criminal law is going to have a role, it should be employed in a much more limited fashion, and implicit in this is the requirement that the offences, penalties and institutional arrangements reflect (what is being declared to be) the criminal nature of the breaches. The “good” must be taken with the “bad” when it comes to employing the criminal law or else perverse incentives, like currently exist, will be created. In a similar vein, local authorities (or whoever is tasked with this role) must commit to using the criminal offences appropriately, rather than the narrow cost versus benefit approach they seem to have adopted at present, and there must be checks in place to ensure this happens.

This is only one way forward. It may be that reparation – that is, that the damage be repaired or the issue fixed and the costs of the local authority reimbursed – is what is most important when dealing with serious non-compliance. In this case, sanctions may not be required at all and rather the focus should be on fixing the issues with the high-level compliance option, the enforcement order, that cause it to be used so infrequently (on a standalone basis).<sup>37</sup> On the other hand, perhaps the time has come for punishment of serious non-compliance to be prioritised. As Judge Harland noted in *Bay of Plenty Regional Council v Whitikau Holdings Ltd*, while “arguably environmental offending was historically seen as more “regulatory offending”, or as Moore DCJ said in *Gubb[s] Motors* ‘statutory breaches’ rather than truly ‘criminal’”,<sup>38</sup> it is:<sup>39</sup>

... worth exploring this issue a little further, and offering the idea that this distinction is no longer as valid as it once may have been. This is because there is more understanding these days of the impact environmental offending can have on human activity, health and wellbeing, particularly if one takes a longer term and intergenerational view. ...

<sup>36</sup> See, for example, John C Coffee Jnr “Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It” (1992) 101(8) *The Yale Law Journal* 1875 at 1876; Zada Lipman “An evaluation of compliance and enforcement mechanisms in the Environment Protection and Biodiversity Conservation Act 1999 (Cth) and their application by the Commonwealth” (2010) 27(2) *Environmental and Planning Law Journal* 98 at 104.

<sup>37</sup> See generally Waikato Regional Council *Basic Investigative Skills for Local Government* (2016) at 112.

<sup>38</sup> *Auckland Regional Council v Gubbs Motors Ltd* DC Auckland CRN-08088500246/08084500006, 20 March 2009.

<sup>39</sup> *Bay of Plenty Regional Council v Whitikau Holdings Ltd* [2018] NZDC 3850 at [217]-[218].

If so, the criminal law can (and, indeed, should) be used, but the requirement that it be employed (and drafted) properly and used appropriately will apply with even more force. Whatever the case, the important thing when the RMA's offences are reviewed is that the goals are decided first and then the tools and institutional arrangements are developed.

The time to do this will come shortly, with the future of the RMA being currently debated.<sup>40</sup> Unlike the impression given last time with the Resource Management Law Reform process, enforcement must not be an after-thought, something to be resolved at the very end and separate from the front-end arrangements. Too much is at stake if it is done poorly again.<sup>41</sup>

---

<sup>40</sup> Following work such as that undertaken by the Environmental Defence Society as to what future resource management legislation might look like (see, for example, Greg Severinsen and Raewyn Peart *Reform of the Resource Management System - The Next Generation - Synthesis Report* (Environmental Defence Society, 2018)), the coalition government has released draft terms of reference for a Comprehensive Review of New Zealand's Resource Management System (see Hon David Parker MP "Comprehensive overhaul of the RMA" (press release, 24 July 2019)). The review panel has recently published an issues and options paper that asks, in terms of compliance, monitoring and enforcement, "36. What changes are needed to compliance, monitoring and enforcement functions under the RMA to improve efficiency and effectiveness? 37. Who should have institutional responsibility for delivery and oversight of these functions? 38. Who should bear the cost of carrying out compliance services?": see Resource Management Review Panel *Transforming the resource management system: Opportunities for change* (November 2019) at 46.

<sup>41</sup> See, for instance, the issues identified in Ministry for the Environment and Stats NZ *New Zealand's Environmental Reporting Series: Environment Aotearoa 2019 Summary* (2019).



## Bibliography

---

### *I Cases*

#### *A New Zealand*

*Auckland City Council v North Power Ltd* DC Auckland CRN 3004510188 & 191, 27 May 2004.

*Auckland City Council v Selwyn Mews Ltd* DC Auckland CRN2004067301-19, 18 June 2003.

*Auckland Council v Fitzgerald* [2016] NZDC 13692.

*Auckland Council v Kelly* [2015] NZDC 16484.

*Auckland Council v Liu* [2016] NZDC 14243.

*Auckland Council v Liu* [2017] NZDC 10864.

*Auckland Council v Liu* [2017] NZDC 22882.

*Auckland Council v Supa Homes Ltd* [2017] NZDC 12780.

*Auckland Council v Zhang* [2017] NZDC 8208.

*Auckland Regional Council v Gubbs Motors Ltd* DC Auckland CRN-08088500246/08084500006, 20 March 2009.

*Auckland Regional Council v Motukaha Investments Ltd* [2016] NZDC 14078.

*Auckland Regional Council v Nuplex Industries Limited* DC Auckland CRN2004066321, 18 March 2003.

*Auckland Regional Council v URS New Zealand Limited* DC Auckland CRI-2008-004-13603, 23 July 2010.

*Auckland Regional Council v URS New Zealand Limited* DC Auckland CRI-2008-004-13603, 6 August 2010.

*Augustowicz v Machinery Movers Ltd* (1992) 2 NZRMA 209 (DC).

*Batchelor v Tauranga District Council (No 2)* [1993] 2 NZLR 84 (HC).

*Bay of Plenty Regional Council v Fonterra Limited* DC Tauranga CRI-2015-087-385, 27 July 2015.

*Bay of Plenty Regional Council v Hood* [2017] NZDC 25156.

*Bay of Plenty Regional Council v Merrie* [2018] NZDC 1621.

*Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd* [2016] NZDC 8903.

*Bay of Plenty Regional Council v Rotorua District Council* DC Rotorua CRI-2017-063-3437, 27 March 2018.

*Bay of Plenty Regional Council v Singh* [2018] NZDC 13866.

*Bay of Plenty Regional Council v Specialised Container Services (Tauranga) Ltd* [2018] NZDC 23159.

*Bay of Plenty Regional Council v Waiohaki Contractors Ltd* [2018] NZDC 19938.

*Bay of Plenty Regional Council v Whitiaki Holdings Ltd* [2018] NZDC 3850.

*Bay of Plenty Regional Council v Withington* [2018] NZDC 1800.

*Calford Holdings Ltd v Waikato Regional Council* (2009) 15 ELRNZ 212 (HC).

*Canterbury Regional Council v A & H Dairies Ltd* [2017] NZDC 1414.

*Canterbury Regional Council v Aitkens Road Dairies Ltd* [2019] NZDC 3190.

*Canterbury Regional Council v B J Dakin & Company Ltd* DC Christchurch CRI-2010-009-7053, 10 June 2010.

*Canterbury Regional Council v Bathurst Coal Ltd* [2019] NZDC 14416.

*Canterbury Regional Council v Bathurst Coal Ltd* [2019] NZDC 23872.

*Canterbury Regional Council v Canterbury Greenwaste Processors Ltd* DC Christchurch CRI-2012-009-9818-9820, 24 April 2013.

*Canterbury Regional Council v Doug Hood Ltd* (1998) 4 ELRNZ 395 (DC).

*Canterbury Regional Council v Foster* DC Christchurch CRI-2013-009-2076, 30 May 2014.

*Canterbury Regional Council v PGG Wrightson Ltd* DC Christchurch CRI-2012-009-11971, 28 March 2013.

*Canterbury Regional Council v Rutherford* [2018] NZDC 17098.

*Canterbury Regional Council v Shaskey* [2017] NZDC 18498.

*Canterbury Regional Council v Shaskey* [2017] NZHC 2540.

*Carruthers v Otago Regional Council* [2014] NZHC 2212.

*Civil Aviation Department v MacKenzie* [1983] NZLR 78 (CA).

*Conway v R* [2013] NZCA 438, [2013] NZRMA 461.

*Conway v R* [2013] NZSC 103, [2013] NZRMA 479.

*Crafar v Waikato Regional Council* HC Hamilton CRI-2009-419-67-69, 13 September 2010.

*Down v R* [2012] NZSC 21, [2012] 2 NZLR 585.

*Dunedin City Council v Duong* DC Dunedin CRI-2009-012-1496, 27 January 2010.

*Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

*Franklin District Council v McCollum* [1994] NZRMA 407 (DC).

*Fugle v R* [2016] NZCA 619, [2017] NZRMA 359.

*Fulton Hogan Ltd v Canterbury Regional Council* [2018] NZDC 17099.

*Fulton Hogan Ltd v Canterbury Regional Council* [2019] NZHC 1767.

- Gisborne City Council v Juken New Zealand Ltd* [2019] NZDC 24075.
- Glenholme Farms Ltd v Bay of Plenty Regional Council* [2012] NZHC 2971.
- Greymouth Petroleum Limited v The Solicitor-General of New Zealand* HC Wellington CIV-2009-485-1425, 25 February 2010.
- Gu v Auckland Council* [2017] NZDC 29242.
- H & S Chisholm Farms Ltd v Waikato Regional Council* [2018] NZHC 1885.
- Hardegger v Southland Regional Council* [2017] NZHC 469.
- Hastings City Council v Simons* [1984] 2 NZLR 502 (HC).
- Hawkes Bay Regional Council v Bartlett* DC Napier CRN0041008890, 16 October 2000.
- Hawkes Bay Regional Council v Cavell* [2017] NZDC 12180.
- Hawkes Bay Regional Council v Stockade Pastoral Farms Ltd* DC Napier CRI-2008-081-96, 20 March 2009.
- Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.
- Interclean Industrial Services Ltd v Auckland Regional Council* [2000] 3 NZLR 489 (HC).
- Jones v Civil Aviation Authority* DC Hamilton CRI-2007-019-1042, 2 October 2008.
- Kiwi Drilling Company Ltd v R* (1997) 4 ELRNZ 23 (CA).
- Lau v R* [2018] NZCA 151.
- Linework Ltd v Department of Labour* [2001] 2 NZLR 639 (CA).
- Liu v Auckland Council* [2018] NZHC 1238.
- Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 (HC).
- Manawatu-Wanganui Regional Council v Ruapehu Alpine Lifts Ltd* (2014) 18 ELRNZ 68 (DC).
- Manawatu-Whanganui Regional Council v PGG Wrightson Ltd* [2019] NZDC 7331.
- Manawatu-Whanganui Regional Council v Williamson* [2019] NZDC 8877.
- Maritime New Zealand v Balomaga* DC Tauranga CRI-2011-070-7734, 25 May 2012.
- Maritime New Zealand v Daina Shipping Company* DC Tauranga CRI-2012-070-1872, 26 October 2012.
- Marlborough District Council v Woolley* [2015] NZDC 16110.
- Matamata-Piako District Council v Fraser-Jones* DC Hamilton CRN 12039500198-200, 26 August 2013.
- McKnight v NZ Biogas Industries Ltd* [1994] 2 NZLR 664 (CA).
- Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC).
- Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA).

*North Shore City Council v Aislabie* DC Auckland CRI-2008-044-003188, 14 October 2008.

*Northland Regional Council v Beejay Stud Ltd* DC Whangarei CRI-2016-088-759-760, 26 October 2016.

*Northland Regional Council v Clear Ridge Station Ltd* DC Whangarei CRI-2016-088-403, 26 October 2016.

*Northland Regional Council v Woodbank Trading Ltd* [2016] NZDC 21397.

*Osborne v Worksafe New Zealand* [2015] NZHC 2991, [2016] 2 NZLR 485.

*Osborne v Worksafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513.

*Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447.

*Otago Regional Council v Bloem* [2010] NZRMA 322 (DC).

*Otago Regional Council v Clark* [2016] NZDC 21626.

*Otago Regional Council v Gibson* [2016] NZDC 14362.

*Otago Regional Council v Jury* [2017] NZDC 8895.

*Otago Regional Council v Liquid Calcium Ltd* [2017] NZDC 11458.

*Otago Regional Council v Queenstown Lakes District Council* [2017] NZDC 28767.

*PF Olsen Ltd v Bay of Plenty Regional Council* [2012] NZHC 2392.

*Plateau Farms Ltd v Waikato Regional Council* HC Rotorua CRI 2007-463-16, 17 September 2007.

*Queenstown Lakes District Council v Allenby Farms Ltd* [2017] NZDC 3251.

*R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.

*R v ANZ Auto Parts Ltd* [2016] NZDC 22102.

*R v Borrett* (2003) 10 ELRNZ 46 (DC).

*R v Borrett* (2003) 10 ELRNZ 133 (CA).

*R v Clifford* [2011] NZCA 360, [2012] 1 NZLR 23.

*R v Conway* [2005] DCR 243.

*R v Conway* [2005] NZRMA 274 (CA).

*R v Conway (No 2)* DC Auckland CRI-2008-004-19495, 18 December 2009.

*R v Fan* [2016] NZDC 7194.

*R v Feeney* DC Hamilton CRI 2006-019-6265, 7 April 2008.

*R v Lau* [2018] NZDC 1133.

*R v Lau* [2018] NZHC 2935.

*R v Lau* DC Auckland CRI-2006-004-010786, 10 July 2018.

*R v Mako* [2000] 2 NZLR 170 (CA).

*R v McCullough* [2016] NZDC 4000.  
*R v Talbot* [2019] NZHC 773.  
*R v Taueki* [2005] 3 NZLR 372 (CA).  
*R v Vortac New Zealand Ltd* [2017] NZDC 2280.  
*R v Woolley* DC Blenheim CRI-2010-006-1979, 20 August 2013.  
*R v Yealands* [2018] NZDC 4115.  
*Registrar of Companies v Feeney* [2011] NZHC 863.  
*Roberts v Northland Regional Council* [2014] NZHC 284.  
*Rochford v Selwyn District Council* [2017] NZDC 12640.  
*Sandstone Dairy Ltd v Southland Regional Council* HC Invercargill CRI 2007-425-1, 15 May 2007.  
*Saxton v Waikato Regional Council* [2018] NZHC 3217.  
*Selwyn Mews Ltd v Auckland City Council* HC Auckland CRI-2003-404-159-161, 30 April 2004.  
*Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767.  
*Solicitor-General v Moore* [2000] 1 NZLR 533 (CA).  
*Southland Regional Council v Baird* [2018] NZDC 11941.  
*Southland Regional Council v Egginton* [2015] NZDC 14393.  
*Southland Regional Council v Euan Shearing Contracting Ltd* DC Invercargill CRN11025501005 & 9, 16 October 2012.  
*Southland Regional Council v Gladvale Farms Ltd* [2017] NZDC 11464.  
*Southland Regional Council v Sandstone Dairy Ltd* DC Invercargill CRN06017500043, 44 & 91, 14 December 2006.  
*Southland Regional Council v Te Wae Wae Dairies Ltd* [2017] NZDC 11466.  
*Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881.  
*Taranaki Regional Council v A J Cowley Ltd* DC New Plymouth CRI-2011-043-2428 & 3192, 15 December 2011.  
*Taranaki Regional Council v Collingwood* [2016] NZDC 16616.  
*Taranaki Regional Council v Fonterra Ltd* [2015] NZDC 14962.  
*Taranaki Regional Council v Mouland* DC New Plymouth CRI-2011-043-3823, 29 January 2013.  
*Taranaki Regional Council v Vernon* [2018] NZDC 14037.  
*Tasman District Council v Hunter Laminates 2014 Ltd (in liq)* [2018] NZDC 17605.  
*Tasman District Council v Mytton* [2017] NZDC 9820.

- Tauranga City Council v Jacko Basil Holdings Ltd* [2016] NZDC 17674.
- Tauranga City Council v Jacko Basil Holdings Ltd* [2017] NZDC 3273.
- Tauranga City Council v Kent DC Tauranga* CRI-2012-070-4916 & 4899, 18 March 2013.
- Thames-Coromandel District Council v May DC Auckland* CRI-2008-004-7940, 5 June 2008.
- Thurston v Manawatu-Wanganui Regional Council* HC Palmerston North CRI-2009-454-24, 25 & 27, 27 August 2010.
- United Fisheries Ltd v Ministry of Agriculture and Fisheries* HC Christchurch AP78/98, 18 June 1998.
- URS New Zealand Limited v Auckland Regional Council* [2012] NZHC 723.
- Waikato Regional Council v Cazjal Farm Ltd* [2017] NZDC 12226.
- Waikato Regional Council v Fulton Hogan Ltd* [2018] NZDC 2711.
- Waikato Regional Council v Fulton Hogan Ltd* [2018] NZDC 6759.
- Waikato Regional Council v Hillside Ltd DC Te Awamutu* CRI-2008-019-500880-919, 20 July 2009.
- Waikato Regional Council v Hold The Gold Ltd DC Hamilton* CRN14019501673-74, 19 December 2014.
- Waikato Regional Council v Huntly Quarries Ltd* [2004] NZRMA 32 (DC).
- Waikato Regional Council v Okawa Ltd* [2018] NZDC 7725.
- Waikato Regional Council v Pollock Farms (2011) Ltd* [2019] NZDC 2204.
- Waikato Regional Council v Rymanda Farms Ltd* [2016] NZDC 15056.
- Waikato Regional Council v Smith* [2018] NZDC 6760.
- Waikato Regional Council v Wyebrook Farms Ltd DC Hamilton* CRN-12-0725-35/36, 25 June 2012.
- Waitakere City Council v Gionis DC Auckland* CRN1090034293, 17 December 2002.
- Wallace Corporation Ltd v Waikato Regional Council* [2012] NZHC 1420.
- Waslander v Southland Regional Council* [2017] NZHC 2699.
- Waste Management NZ Ltd v Bay of Plenty Regional Council* [2018] NZCA 171.
- Wellington City Council v Patel* [2017] NZDC 6771.
- Wellington Regional Council v Phillips* [2016] NZDC 2817.
- Wellington Regional Council v Shell Oil New Zealand Ltd* (1993) 1A ELRNZ 306 (DC).
- West Coast Regional Council v Johnson Brothers Transport (2006) Ltd* [2018] NZDC 22057.
- Wijlens v Police* HC Auckland AP115/94, 20 June 1994.
- Withington v Bay of Plenty Regional Council* [2018] NZHC 1237.

*Works Infrastructure Ltd v Taranaki Regional Council* (2002) 8 ELRNZ 84 (HC).

*Worksafe New Zealand v Rangiora Carpets Ltd* [2017] NZDC 22587.

### *B Canada*

*R v Bata Industries Ltd* (1992) 9 OR (3d) 329, 7 CELR (NS) 293 (Ontario Court (Provincial Division)).

*R v Bata Industries Ltd* 1993 CarswellOnt 264, [1993] OJ No 1679, 11 CELR (NS) 208, 14 OR (3d) 354 (Ont Ct of Justice).

### *C European Union*

*Engel v Netherlands* (1979-80) 1 EHRR 647.

### *D United Kingdom*

*The Bhowanipur Banking Corp Ltd v Dasi* (1941) 74 Calcutta Law Journal 408 (PC).

*Burrows v Rhodes* [1899] 1 QB 816.

*Fowler v Padget* (1798) 7 Term Reports 509.

*Gouriet v Union of Post Office Workers* [1978] AC 435.

*Keir v Leeman* (1846) 9 QB 371, 115 ER 1315 (Exch Ch).

*Sherras v De Rutzen* [1895] 1 QB 918.

## *II Legislation*

### *A New Zealand*

#### *1 Statutes*

Biosecurity Act 1993.

Building Act 2004.

Clean Air Act 1972.

Clean Air Amendment Act 1982.

Companies Act 1993.

Costs in Criminal Cases Act 1967.

Crimes Act 1961.

Criminal Disclosure Act 2008.

Criminal Justice Act 1985.

Criminal Procedure Act 2011.

Crown Entities Act 2004.

District Courts Act 2016.  
Dog Control Act 1996.  
Dog Registration Act 1880.  
Finance (No 2) Act 1927.  
Financial Markets Conduct Act 2013.  
Fisheries Act 1996.  
Food Act 2014.  
Hazardous Substances and New Organisms Act 1996.  
Health and Safety at Work Act 2015.  
Health and Safety in Employment Act 1992.  
Health and Safety in Employment Amendment Act 2002.  
Local Government Act 2002.  
Local Government and Official Information and Meetings Act 1987.  
Mining Act 1971.  
Official Information Act 1982.  
Overseas Investment Act 2005.  
Petroleum Act 1937.  
Petroleum Amendment Act 1975.  
Public Finance Act 1989.  
Resource Legislation Amendment Act 2017.  
Resource Management (Simplifying and Streamlining) Amendment Act 2009.  
Resource Management Act 1991.  
Resource Management Amendment Act 1994.  
Resource Management Amendment Act 1996.  
Resource Management Amendment Act 1997.  
River Boards Act 1908.  
Securities Markets Act 1988.  
Sentencing Act 2002.  
Summary Proceedings Act 1957.  
Town and Country Planning Act 1977.  
Toxic Substances Act 1979.  
Unsolicited Electronic Messages Act 2007.  
Water and Soil Conservation Act 1967.  
Water and Soil Conservation Amendment Act 1971.



## 2 Regulations

Costs in Criminal Cases Regulations 1987.

Crown Prosecution Regulations 2013.

Resource Management (Discount on Administrative Charges) Regulations 2010.

Resource Management (Forms, Fees, and Procedure) Regulations 2003.

Resource Management (Infringement Offences) Regulations 1999.

Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017.

## 3 Bills

Resource Management Amendment Bill 2019 (180-1).

Resource Management Bill 1989 (224-1).

## B Australia

Environment Protection and Biodiversity Conservation Act 1999 (Cth).

## C United Kingdom

Regulatory Enforcement and Sanctions Act 2008.

## III Books and Chapters in Books

Carolyn Abbot *Enforcing Pollution Control Regulation* (Hart Publishing, Portland, 2009).

Andrew Ashworth “Desert” in Andreas Von Hirsch, Andrew Ashworth and Julian Roberts (eds) *Principled sentencing: readings on theory and policy* (3rd ed, Hart Publishing, Portland, 2009).

Andrew Ashworth *Sentencing and criminal justice* (5th ed, Cambridge University Press, Cambridge, 2010).

Andrew Ashworth “Should Strict Criminal Liability be Removed from all Imprisonable Offences?” in Andrew Ashworth (ed) *Positive Obligations in Criminal Law* (Hart Publishing, Oxford, 2013).

Andrew Ashworth and Jeremy Horder *Principles of criminal law* (7th ed, Oxford University Press, Oxford, 2013).

Andrew Ashworth and Mike Redmayne *The criminal process* (3rd ed, Oxford University Press, New York, 2005).

Andrew Ashworth and Lucia Zedner “Just Prevention: Preventive Rationales and The Limits of the Criminal Law” in RA Duff and Stuart Green (eds) *Philosophical foundations of criminal law* (Oxford University Press, New York, 2011).

Ian Ayres and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, New York, 1992).

Robert Baldwin “Regulation: After 'Command and Control'” in Keith Hawkins (ed) *The Human Face of Law: Essays in Honour of Donald Harris* (Clarendon Press, Oxford, 1997).

Robert Baldwin and Martin Cave *Understanding Regulation* (1st ed, Oxford University Press, New York, 1999).

Robert Baldwin, Martin Cave and Martin Lodge “Introduction: Regulation - The Field and the Developing Agenda” in Robert Baldwin, Martin Cave and Martin Lodge (eds) *The Oxford Handbook of Regulation* (Oxford University Press, New York, 2010).

Robert Baldwin, Martin Cave and Martin Lodge *Understanding Regulation* (2nd ed, Oxford University Press, New York, 2011).

Robert Baldwin, Colin Scott and Christopher Hood *A Reader on Regulation* (Oxford University Press, Oxford, 1998).

Cesare Beccaria *On Crimes and Punishments* (1764).

Jeremy Bentham *An introduction to the principles of morals and legislation* (1789).

Julia Black “What is Regulatory Innovation?” in Julia Black, Martin Lodge and Mark Thatcher (eds) *Regulatory Innovation* (Edward Elgar, Cheltenham, 2005).

John Braithwaite *Restorative justice & responsive regulation* (Oxford University Press, Oxford, 2002).

Kathleen Brickey *Environmental Crime: Law, Policy, Prosecution* (Aspen Publishers, New York, 2008).

Richard Brown and Murray Rankin “Persuasion, Penalties, and Prosecution: Administrative v Criminal Sanctions” in Martin Friedland (ed) *Securing Compliance: Seven Case Studies* (University of Toronto Press, Toronto, 1990).

Ton Buhrs and Robert V Bartlett *Environmental policy in New Zealand: the politics of clean and green?* (Oxford University Press, Auckland, 1993).

Janette Campbell “Statutory remedies: the enforcement provisions of the Resource Management Act 1991” in Derek Nolan (ed) *Environmental and resource management law* (5th ed, LexisNexis, Wellington, 2015).

Robert Cooter and Thomas Ulen *Law & Economics* (5th ed, Pearson/Addison Wesley, Boston, 2008).

Sean Coyle and Karen Morrow *The Philosophical Foundations of Environmental Law* (Hart Publishing, Portland, 2004).

AV Dicey *Introduction to the study of the law of the constitution* (Liberty/Classics, Indianapolis, 1982).

Susan Dimock “Contractarian Criminal Law Theory and *Mala Prohibita* Offences” in RA Duff and others (eds) *Criminalization: the political morality of the criminal law* (Oxford University Press, Oxford, 2014).

RA Duff *Answering for crime: responsibility and liability in the criminal law* (Hart Publishing, Oxford, 2007).

RA Duff “Crimes, Regulatory Offences and Criminal Trials” in Heinz Müller-Dietz (ed) *Festschrift für Heike Jung* (Nomos Verlagsgesellschaft, Frankfurt, 2007).

RA Duff “Perversions and Subversions of Criminal Law” in RA Duff and others (eds) *The Boundaries of the Criminal Law* (Oxford University Press, New York, 2010).

RA Duff and others *Trial on Trial : Volume 3: Towards a Normative Theory of the Criminal Trial* (Hart Publishing, Oxford, 2007).

Ronald Dworkin *Taking rights seriously* (Harvard University Press, Cambridge, 1977).

Lindsay Farmer “Criminal Law as an Institution: Rethinking Theoretical Approaches to Criminalization” in RA Duff and others (eds) *Criminalization: the political morality of the criminal law* (Oxford University Press, Oxford, 2014).

David Farrier “In Search of Real Criminal Law” in T Bonyhady (ed) *Environmental Protection and Legal Change* (The Federation Press, Sydney, 1992).

Michael Faure “The Evolution of Environmental Criminal Law in Europe: A Comparative Analysis” in Andrew Farmer, Michael Faure and Grazia Maria Veronica Vagliasindi (eds) *Environmental crime in Europe* (Hart Publishing, Oxford, 2017).

Joel Feinberg *Doing and deserving: essays in the theory of responsibility* (Princeton University Press, Princeton, 1970).

Joel Feinberg *Harm to Others* (Oxford University Press, Oxford, 1984).

Loraine Gelsthorpe and Nicola Padfield “Introduction” in Loraine Gelsthorpe and Nicola Padfield (eds) *Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond* (Taylor & Francis Group, Uffculme, 2012).

Neil Gunningham “Enforcement and Compliance Strategies” in Robert Baldwin, Martin Cave and Martin Lodge (eds) *The Oxford Handbook of Regulation* (Oxford University Press, New York, 2010).

Neil Gunningham, Peter Grabosky and Darren Sinclair *Smart regulation: designing environmental policy* (Clarendon Press, Oxford, 1998).

Neil Gunningham and Richard Johnstone *Regulating workplace safety: system and sanctions* (Oxford University Press, Oxford, 1999).

HLA Hart *Punishment and responsibility: essays in the philosophy of law* (Clarendon Press, Oxford, 1968).

Keith Hawkins *Environment and Enforcement: Regulation and the Social Definition of Pollution* (Clarendon Press, Oxford, 1984).

Keith Hawkins *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (Oxford University Press, Oxford, 2002).

Keith Hawkins and John Thomas “The Enforcement Process in Regulatory Bureaucracies” in Keith Hawkins and John Thomas (eds) *Enforcing Regulation* (Kluwer-Nijhoff Publishing, Boston, 1984).

Grant Hewison “The Resource Management Act 1991” in Peter Salmon and David Grinlinton (eds) *Environmental law in New Zealand* (Thomson Reuters, Wellington, 2015).

Chris Hilson *Regulating Pollution: A UK and EC Perspective* (Hart Publishing, Oxford, 2000).

Jeremy Horder “Bureaucratic ‘Criminal’ Law: Too Much of a Bad Thing?” in RA Duff and others (eds) *Criminalization: the political morality of the criminal law* (Oxford University Press, Oxford, 2014).

Jeremy Horder “Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation” in GR Sullivan and Ian Dennis (eds) *Seeking Security: Pre-Emptying the Commission of Criminal Harms* (Hart Publishing, Oxford, 2012).

Douglas Husak “Malum Prohibitum and Retributivism” in RA Duff and Stuart Green (eds) *Defining crimes: essays on the special part of the criminal law* (Oxford University Press, Oxford, 2005).

Douglas Husak *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, Oxford, 2008).

Bridget Hutter *Compliance: Regulation and Environment* (Clarendon Press, Oxford, 1997).

Nils Jareborg “What Kind of Criminal Law do we Want?” in Annika Snare (ed) *Beware of Punishment: On the Utility and Futility of Criminal Law* (Pax Forlag, Oslo, 1995).

Philip Joseph *Constitutional and administrative law in New Zealand* (4th ed, Brookers, Wellington, 2014).

Robert Kagan “On Regulatory Inspectorates and Police” in Keith Hawkins and John Thomas (eds) *Enforcing Regulation* (Kluwer-Nijhoff Publishing, Boston, 1984).

Robert Kagan and John Scholz “The “Criminology of the Corporation” and Regulatory Enforcement Strategies” in Keith Hawkins and John Thomas (eds) *Enforcing Regulation* (Kluwer Nijhoff Publishing, Boston, 1984).

Nicola Lacey “Criminalization as Regulation” in Christine Parker and others (eds) *Regulating Law* (Oxford University Press, Oxford, 2004).

Richard Macrory *Regulation, Enforcement and Governance in Environmental Law* (2nd ed, Hart Publishing, Oxford, 2014).

P Ali Memon *Keeping New Zealand Green: Recent Environmental Reforms* (University of Otago Press, Dunedin, 1993).

John Stuart Mill *On Liberty* (1859).

Michael Moore “The Moral Worth of Retribution” in Andreas Von Hirsch, Andrew Ashworth and Julian Roberts (eds) *Principled sentencing: readings on theory and policy* (3rd ed, Hart Publishing, Portland, 2009).

Michael Moore *Placing blame: a general theory of the criminal law* (Clarendon Press, Oxford, 1997).

Wendy Naysnerski and Tom Tietenberg “Private Enforcement” in Tom Tietenberg (ed) *Innovation in environmental policy: economic and legal aspects of recent developments in environmental enforcement and liability* (EE Elgar, Aldershot, 1992).

Alan Norrie *Crime, reason and history: a critical introduction to criminal law* (3rd ed, Cambridge University Press, Cambridge, 2014).

Anthony Ogus “Enforcing regulation: do we need the criminal law?” in Hans Sjögren and Göran Skogh (eds) *New perspectives on economic crime* (Edward Elgar Publishing, United Kingdom, 2004).

Anthony Ogus *Regulation: legal form and economic theory* (Clarendon Press, Oxford, 1994).

Emanuela Orlando and Tiffany Bergin “Forging a socio-legal approach to environmental harms” in Tiffany Bergin and Emanuela Orlando (eds) *Forging a socio-legal approach to environmental harms: global perspectives* (Routledge, Abingdon, 2017).

Herbert Packer *The limits of the criminal sanction* (Stanford University Press, Stanford, 1968).

Kenneth Palmer “Introduction to environmental law” in Derek Nolan (ed) *Environmental and resource management law* (5th ed, LexisNexis, Wellington, 2015).

Kenneth Palmer “Resource Management Act 1991” in Derek Nolan (ed) *Environmental and resource management law* (5th ed, LexisNexis, Wellington, 2015).

Raymond Paternoster “Deterrence and Rational Choice Theories” in J Mitchell Miller (ed) *21st Century Criminology: A Reference Handbook* (1st ed, Sage Publications, Thousand Oaks, 2009).

A Mitchell Polinsky and Steven Shavell “The Theory of Public Enforcement of Law” in A Mitchell Polinsky and Steven Shavell (eds) *Handbook of law and economics* (1st ed, Elsevier, Amsterdam, 2007).

Richard Posner *Economic analysis of law* (7th ed, Wolters Kluwer, Austin, 2007).

Roscoe Pound *The development of constitutional guarantees of liberty* (Yale University Press, New Haven, 1957).

Joseph Raz *The authority of law: essays on law and morality* (Clarendon Press, Oxford, 1979).

Albert J Reiss Jr “Selecting Strategies of Social Control over Organisational Life” in Keith Hawkins and John Thomas (eds) *Enforcing Regulation* (Kluwer-Nijhoff Publishing, Boston, 1984).

Genevra Richardson, Anthony Ogus and Paul Burrows *Policing Pollution: A Study of Regulation and Enforcement* (Clarendon Press, Oxford, 1982).

Julian Roberts and Andrew Ashworth “Deterrence” in Andreas Von Hirsch, Andrew Ashworth and Julian Roberts (eds) *Principled sentencing: readings on theory and policy* (3rd ed, Hart Publishing, Portland, 2009).

Andrew Sanders and Richard Young *Criminal justice* (3rd ed, Oxford University Press, Oxford, 2007).

Philip Selznick “Focusing Organisational Research on Regulation” in Roger Noll (ed) *Regulatory Policy and the Social Sciences* (University of California Press, Berkley, 1985).

AP Simester “Is Strict Liability Always Wrong” in AP Simester (ed) *Appraising Strict Liability* (Oxford University Press, Oxford, 2005).

AP Simester and ATH Smith “Criminalization and the Role of Theory” in AP Simester and ATH Smith (eds) *Harm and Culpability* (Clarendon Press, Oxford, 1996).

AP Simester and others *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Hart Publishing, Oxford, 2013).

AP Simester and Andreas Von Hirsch “Regulating Offensive Conduct through Two-Step Prohibitions” in AP Simester and Andreas Von Hirsch (eds) *Incivilities: regulating offensive behaviour* (Hart Publishing, Portland, 2006).

AP Simester and Andreas Von Hirsch *Crimes, harms, and wrongs: on the principles of criminalisation* (Hart Publishing, Oxford, 2011).

Gary Slapper *Organisational Prosecutions* (Routledge, London, 2018).

Malcolm Sparrow *The Regulatory Craft* (Brookings Institution Press, Washington, DC, 2000).

John Spencer and Antje du Bois-Pedain “Approaches to Strict and Constructive Liability in Continental Criminal Law” in AP Simester (ed) *Appraising Strict Liability* (Oxford University Press, Oxford, 2005).

William J Stuntz *The collapse of American criminal justice* (Harvard University Press, Cambridge, 2011).

GR Sullivan “Strict Liability for Criminal Offences in England and Wales Following Incorporation into English Law of the European Convention on Human Rights” in AP Simester (ed) *Appraising Strict Liability* (Oxford University Press, Oxford, 2005).

Edwin Sutherland *White collar crime: the uncut version* (Yale University Press, New Haven, 1983).

Victor Tadros “Criminalization and Regulation” in RA Duff and others (eds) *The Boundaries of the Criminal Law* (Oxford University Press, New York, 2010).

Victor Tadros *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford University Press, Oxford, 2011).

Victor Tadros “Fair Labelling and Social Solidarity” in Lucia Zedner and Julian Roberts (eds) *Principles and values in criminal law and criminal justice: essays in honour of Andrew Ashworth* (Oxford University Press, Oxford, 2012).

Victor Tadros *Wrongness and criminalization* (Routledge, New York, 2012).

Cento Veljanovski “The Economics of Regulatory Enforcement” in Keith Hawkins and John Thomas (eds) *Enforcing Regulation* (Kluwer-Nijhoff Publishing, Boston, 1984).

Cento Veljanovski “Economic Approaches to Regulation” in Robert Baldwin, Martin Cave and Martin Lodge (eds) *The Oxford Handbook of Regulation* (Oxford University Press, New York, 2010).

Andreas Von Hirsch *Censure and sanctions* (Clarendon Press, New York, 1993).

Andreas Von Hirsch and Andrew Ashworth “The Justification for Punishment's Existence: Censure and Prevention” in Andreas Von Hirsch and Andrew Ashworth (eds) *Proportionate sentencing: exploring the principles* (Oxford University Press, New York, 2005).

Andreas Von Hirsch, Andrew Ashworth and Julian Roberts *Principled sentencing: readings on theory and policy* (3rd ed, Hart Publishing, Portland, 2009).

Andreas Von Hirsch and others *Criminal deterrence and sentence severity: an analysis of recent research* (Hart Publishing, Oxford, 1999).

Ceri Warnock and Karenza de Silva “Compliance and Enforcement” in Peter Salmon and David Grinlinton (eds) *Environmental law in New Zealand* (Thomson Reuters, Wellington, 2015).

Cheryl Wasserman “Federal Enforcement: Theory and Practice” in Tom Tietenberg (ed) *Innovation in environmental policy: economic and legal aspects of recent developments in environmental enforcement and liability* (EE Elgar, Aldershot, 1992).

Celia Wells *Corporations and criminal responsibility* (Clarendon Press, Oxford, 1993).

Rob White *Crimes Against nature: Environmental criminology and ecological justice* (Willan Publishing, Devon, 2008).

David Whyte “An intoxicated politics of regulation” in Hannah Quirk, Toby Seddon and Graham Smith (eds) *Regulation and Criminal Justice* (Cambridge University Press, United Kingdom, 2010).

Eric Windholz *Governing through regulation: public policy, regulation and the law* (Routledge, New York, 2017).

Karen Yeung *Securing compliance: a principled approach* (Hart Publishing, Oxford, 2004).

#### *IV Journal Articles*

Carolyn Abbot “The enforcement of pollution control laws in England and Wales: A case for reform?” (2005) 22(1) *Environmental and Planning Law Journal* 68.

Carolyn Abbot “The regulatory enforcement of pollution control laws: The Australian experience” (2005) 17(2) *Journal of Environmental Law* 161.

Paul Almond and Sarah Colover “Communication and Social Regulation: The Criminalization of Work-Related Death” (2012) 52(5) *The British Journal of Criminology* 997.

Andrew Ashworth “Is the Criminal Law a Lost Cause?” (2000) 116 *Law Quarterly Review* 225.

Andrew Ashworth “Four Threats to the Presumption of Innocence” (2006) 10(4) *The International Journal of Evidence & Proof* 241.

Andrew Ashworth and Lucia Zedner “Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions” (2008) 2 *Criminal Law and Philosophy* 21.



Andrew Ashworth and Lucia Zedner "Prevention and Criminalization: Justifications and Limits" (2012) 15(4) *New Criminal Law Review: An International and Interdisciplinary Journal* 542.

Mirko Bagaric "The 'civil-isation' of the criminal law" (2001) 25(4) *Criminal Law Journal* 184.

Robert Baldwin "Why Rules Don't Work" (1990) 53(3) *Modern Law Review* 321.

Robert Baldwin "The New Punitive Regulation" (2004) 67(3) *Modern Law Review* 351.

Robert Baldwin and Julia Black "Really Responsive Regulation" (2008) 71(1) *Modern Law Review* 59.

Harry Ball and Lawrence Friedman "The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View" (1965) 17(2) *Stanford Law Review* 197.

M Beazley and Myles Pulsford "Discretion and the rule of law in the criminal justice system" (2015) 89(3) *Australian Law Journal* 158.

Gary Becker "Crime and Punishment: An Economic Approach" (1968) 76(2) *Journal of Political Economy* 169.

Gary Becker and George Stigler "Law Enforcement, Malfeasance, and Compensation of Enforcers" (1974) 3(1) *The Journal of Legal Studies* 1.

Carole Billiet, Thomas Blondiau and Sandra Rousseau "Punishing environmental crimes: An empirical study from lower courts to the court of appeal" (2014) 8(4) *Regulation & Governance* 472.

John Billington "Recent New Zealand efforts to combat environmental crime" (1995) 6(2) *Criminal Law Forum* 389.

Jack Bilmes and John Woodbury "Deterrence and Justice: Setting Civil Penalties in the Federal Trade Commission" (1991) 14 *Research in Law and Economics* 191.

Patrick Bishop "Criminal law as a preventative tool of environmental regulation: compliance versus deterrence" (2009) 60(3) *Northern Ireland Legal Quarterly* 279.

Julia Black "Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World" (2001) 54(1) *Current Legal Problems* 103.

Julia Black and Robert Baldwin "Really Responsive Risk-Based Regulation" (2010) 32(2) *Law & Policy* 181.

Julia Black and Robert Baldwin "When risk-based regulation aims low: Approaches and challenges" (2012) 6(1) *Regulation & Governance* 2.

Roger Bowles, Michael Faure and Nuno Garoupa “The Scope of Criminal Law and Criminal Sanctions: An Economic View and Policy Implications” (2008) 35(3) *Journal of Law and Society* 389.

John Braithwaite and Gilbert Geis “On Theory and Action for Corporate Crime Control” (1982) 28(2) *Crime & Delinquency* 292.

John Braithwaite and Toni Makkai “Testing an Expected Utility Model of Corporate Deterrence” (1991) 25(1) *Law & Society Review* 7.

Kathleen Brickey “Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory” (1996) 71 *Tulane Law Review* 487.

Kathleen Brickey “The Rhetoric of Environmental Crime: Culpability, Discretion, and Structural Reform” (1998) 84 *Iowa Law Review* 115.

John Brigham and Don Brown “Distinguishing penalties and incentives” (1980) 2(1) *Law and Policy Quarterly* 5.

David Brown “Criminalisation and normative theory” (2013) 25(2) *Current Issues in Criminal Justice* 605.

RM Brown “Administrative and criminal penalties in the enforcement of occupational health and safety legislation” (1992) 30(3) *Osgoode Hall Law Journal* 691.

Raymond Burby and Robert Paterson “Improving Compliance with State Environmental Regulations” (1993) 12(4) *Journal of Policy Analysis and Management* 753.

WG Carson “Some Sociological Aspects of Strict Liability and the Enforcement of Factory Legislation” (1970) 33(4) *Modern Law Review* 396.

James Chalmers and Fiona Leverick “Fair Labelling in Criminal Law” (2008) 71(2) *Modern Law Review* 217.

Ronald Coase “The Problem of Social Cost” (1960) 3 *The Journal of Law & Economics* 1.

John C Coffee Jr “‘No Soul to Damn: No Body to Kick’: An Unscandalized Inquiry into the Problem of Corporate Punishment” (1981) 79 *Michigan Law Review* 386.

John C Coffee Jr “Does ‘Unlawful’ Mean ‘Criminal’?: Reflections on the Disappearing Tort/Crime Distinction in American Law” (1991) 71 *Boston University Law Review* 193.

John C Coffee Jr “Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It” (1992) 101(8) *The Yale Law Journal* 1875.

Mark Cohen “Environmental Crime and Punishment: Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes” (1992) 82(4) *The Journal of Criminal Law and Criminology* 1054.

Mark Cohen “Empirical Research on the Deterrent Effect of Environmental Monitoring and Enforcement” (2000) 30 *Environmental Law Reporter* 10245.

Robert Cooter “Prices and Sanctions” (1984) 84(6) *Columbia Law Review* 1523.

Adam Crawford “‘Contractual Governance’ of Deviant Behaviour” (2003) 30(4) *Journal of Law and Society* 479.

Penny Crofts “Communicating the culpability of illegal dumping: *Bankstown v Hanna* (2014)” (2015) 2(1) *Australian Journal of Environmental Law* 57.

Kenneth Dau-Schmidt “An Economic Analysis of the Criminal Law as a Preference-Shaping Policy” (1990) 39(1) *Duke Law Journal* 1.

Kenneth Dau-Schmidt “Economics and sociology: The prospects for an interdisciplinary discourse on law” (1997) 1997(3) *Wisconsin Law Review* 389.

Trevor Daya-Winterbottom “The prosecution of environmental offences in New Zealand” [2009] 5 *Environmental Liability* 177.

Paula de Prez “Beyond judicial sanctions: the negative impact of conviction for environmental offences” (2000) 2 *Environmental Law Review* 11.

Paula de Prez “Excuses, Excuses: The Ritual Trivialisation of Environmental Prosecutions” (2000) 12(1) *Journal of Environmental Law* 65.

Bernard Dickens “Discretion in Local Authority Prosecutions” [1970] *Criminal Law Review* 618.

Colin Diver “A Theory of Regulatory Enforcement” (1980) 28(3) *Public Policy* 257.

Colin Diver “The Optimal Precision of Administrative Rules” (1983) 93(1) *The Yale Law Journal* 65.

RA Duff “Crime, Prohibition, and Punishment” (2002) 19(2) *Journal of Applied Philosophy* 97.

RA Duff “Towards a Modest Legal Moralism” (2014) 8(1) *Criminal Law and Philosophy* 217.

RA Duff and Sandra Marshall “Crimes, Public Wrongs, and Civil Order” (2018) *Criminal Law and Philosophy* 1.

Michael Faure “The revolution in environmental criminal law in Europe” (2017) 35(2) *Virginia Environmental Law Journal* 321.

Michael Faure and Katarina Svatikova “Criminal or Administrative Law to Protect the Environment? Evidence from Western Europe” (2012) 24(2) *Journal of Environmental Law* 253.

Paul Fenn and Cento Veljanovski "A Positive Economic Theory of Regulatory Enforcement" (1988) 98 *The Economic Journal* 1055.

Richard Fisher "Prosecution of environmental offences under New Zealand's Resource Management Act 1991: troublesome policy issues for local government" (2005) 10 *Local Government Law Journal* 119.

Brent Fisse "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 *Southern California Law Review* 1141.

Nicola Franklin "Environmental Pollution Control: The Limits of the Criminal Law" (1990) 2 *Current Issues in Criminal Justice* 81.

Arie Freiberg "Reconceptualizing Sanctions" (1987) 25(2) *Criminology* 223.

Jan Freigang "Scrutiny: Is Responsive Regulation Compatible with the Rule of Law?" (2002) 8(4) *European Public Law* 463.

Nuno Garoupa "The Theory of Optimal Law Enforcement" (1997) 11(3) *Journal of Economic Surveys* 267.

Nuno Garoupa, Anthony Ogus and Andrew Sanders "The Investigation and Prosecution of Regulatory Offences: Is There An Economic Case for Integration?" (2011) 70(1) *Cambridge Law Journal* 229.

Hazel Genn "Business Responses to the Regulation of Health and Safety in England" (1993) 15(3) *Law & Policy* 219.

Carole Gibbs "Corporate citizenship and corporate environmental performance" (2012) 57(4) *Crime, Law and Social Change* 345.

Jack Gibbs "Crime, Punishment, and Deterrence" (1968) 48(4) *Southwestern Social Science Quarterly* 515.

Wayne Gray and John Scholz "Does Regulatory Enforcement Work? A Panel Analysis of OSHA Enforcement" (1993) 27(1) *Law & Society Review* 177.

Wayne Gray and Jay Shimshack "The Effectiveness of Environmental Monitoring and Enforcement: A Review of the Empirical Evidence" (2011) 5(1) *Review of Environmental Economics and Policy* 3.

Stuart Green "Why it's a crime to tear the tag off a mattress: Overcriminalization and the moral content of regulatory offenses" (1997) 46(4) *Emory Law Journal* 1533.

Michael Greve "Environmentalism and bounty hunting" (1989) 97 *Public Interest* 15.

David Grinlinton "Enforcement mechanisms under the RMA" (1992)(3) *Planning Quarterly* 13.

David Grinlinton “Sentencing under the RMA” (2009) 8 *Brookers Resource Management Bulletin* 33.

Neil Gunningham “Regulating Small and Medium Sized Enterprises” (2002) 14(1) *Journal of Environmental Law* 3.

Neil Gunningham “Environment Law, Regulation and Governance: Shifting Architectures” (2009) 21(2) *Journal of Environmental Law* 179.

Neil Gunningham “Enforcing Environmental Regulation” (2011) 23(2) *Journal of Environmental Law* 169.

Neil Gunningham and Cameron Holley “Next-Generation Environmental Regulation: Law, Regulation, and Governance” (2016) 12(1) *Annual Review of Law and Social Science* 273.

Matthew Hall “The Roles and Use of Law in Green Criminology” (2014) 3(2) *International Journal for Crime, Justice and Social Democracy* 96.

Winston Harrington “Enforcement leverage when penalties are restricted” (1988) 37(1) *Journal of Public Economics* 29.

Henry M Hart Jnr “The Aims of the Criminal Law” (1958) 23(3) *Law and Contemporary Problems* 401.

Keith Hawkins “Enforcing Regulation: Robert Kagan's Contribution-And Some Questions” (2013) 38(4) *Law & Social Inquiry* 950.

Anthony Heyes “Making Things Stick: Enforcement and Compliance” (1998) 14(4) *Oxford Review of Economic Policy* 50.

Constance Hunt, Peter Bobeff and Kenneth Palmer “Legal Issues arising from the Principle of Sustainable Development: Australia, Canada and New Zealand” (1991) 1 *Journal of Energy and Natural Resources Law* 1.

Douglas Husak “The Criminal Law as Last Resort” (2004) 24(2) *Oxford Journal of Legal Studies* 207.

Bridget Hutter “Variations in Regulatory Enforcement Styles” (1989) 11(2) *Law & Policy* 153.

John Calvin Jefferies Jnr “Legality, Vagueness, and the Construction of Penal Statutes” (1985) 71(2) *Virginia Law Review* 189.

Alastair Jewell “Case Note: *McKnight v NZ Biogas Industries Ltd* [1994] NZRMA 258” (1994) 7 *Auckland University Law Review* 754.

Chris Jurgeleit “Insurance Against Liability to Pay Statutory Fines and Penalties” (1996) 26 *Victoria University of Wellington Law Review* 735.

Sanford Kadish "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations" (1963) 30(3) *The University of Chicago Law Review* 423.

Dan Kahan "Between Economics and Sociology: The New Path of Deterrence" (1997) 95(8) *Michigan Law Review* 2477.

Nathaniel Keohane, Richard Revesz and Robert Stavins "The Choice of Regulatory Instruments in Environmental Policy" (1998) 22 *Harvard Environmental Law Review* 313.

Susan Klein "Redrawing the criminal-civil boundary" (1999) 2(2) *Buffalo Criminal Law Review* 679.

Daniel Klerman "Settlement and the Decline of Private Prosecution in Thirteenth-Century England" (2001) 19(1) *Law and History Review* 1.

Nicola Lacey "Historicising Criminalisation: Conceptual and Empirical Issues" (2009) 72(6) *Modern Law Review* 936.

Grant Lamond "What Is a Crime?" (2007) 27(4) *Oxford Journal of Legal Studies* 609.

William Landes and Richard Posner "The Private Enforcement of Law" (1975) 4(1) *The Journal of Legal Studies* 1.

Richard Lazarus "Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime" (1994) 27 *Loyola of Los Angeles Law Review* 867.

Richard Lazarus "Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law" (1995) 83 *Georgetown Law Journal* 2407.

Rick Libman "Sentencing Purposes and Principles for Regulatory Offences: A New Approach for Regulatory Justice" (2011) 15(3) *Canadian Criminal Law Review* 359.

Zada Lipman "An evaluation of compliance and enforcement mechanisms in the Environment Protection and Biodiversity Conservation Act 1999 (Cth) and their application by the Commonwealth" (2010) 27(2) *Environmental and Planning Law Journal* 98.

George Loewenstein "Anticipation and the Valuation of Delayed Consumption" (1987) 97(387) *The Economic Journal* 666.

Richard Macrory "Sanctions and Safeguards: The Brave New World of Regulatory Enforcement" (2013) 66(1) *Current Legal Problems* 233.

Richard Macrory "Environmental Sanctions - Challenges and Opportunities" (2015) 45(6) *Environmental Policy and Law* 276.

Kenneth Mann "Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law" (1992) 101(8) *The Yale Law Journal* 1795.

Sandra Marshall and RA Duff "Criminalization and Sharing Wrongs" (1998) 11(1) *The Canadian Journal of Law and Jurisprudence* 7.

Peter May “Compliance Motivations: Affirmative and Negative Bases” (2004) 38(1) *Law & Society Review* 41.

Roland McKean “Enforcement Costs in Environmental and Safety Regulation” (1980) 6(3) *Policy Analysis* 269.

Kimberly McMurray-Cathcart “Breaching Resource Consent Conditions” (2000) 9 *Auckland University Law Review* 280.

Markus Milne “Is the Act Soft on Polluters” (1992) 15 *Terra Nova* 34.

Raymond Mushal “Reflections upon American Environmental Enforcement Experience as it may relate to Post-Hampton Developments in England and Wales” (2007) 19(2) *Journal of Environmental Law* 201.

Daniel Nagin and Greg Pogarsky “Integrating celerity, impulsivity, and extra-legal sanction threats into a model of general deterrence: Theory and evidence” (2001) 39(4) *Criminology* 865.

Vibeke Nielsen and Christine Parker “Testing responsive regulation in regulatory enforcement” (2009) 3(4) *Regulation and Governance* 376.

Anthony Ogus “Regulatory law: some lessons from the past” (1992) 12(1) *Legal Studies* 1.

Anthony Ogus and Carolyn Abbot “Sanctions for Pollution: Do we have the right regime?” (2002) 14(3) *Journal of Environmental Law* 283.

Geoffrey Palmer “Ruminations on the problems with the Resource Management Act - Part 2” [2016] *New Zealand Law Journal* 46.

Matthew Palmer “Impressions of Life and Law on the High Court Bench” (2018) 49(3) *Victoria University of Wellington Law Review* 297.

Christine Parker “The ‘Compliance’ Trap: The Moral Message in Responsive Regulatory Enforcement” (2006) 40(3) *Law & Society Review* 591.

Raymond Paternoster “How Much Do We Really Know About Criminal Deterrence?” (2010) 100(3) *The Journal of Criminal Law and Criminology* 765.

Oren Perez “Regulation as the art of intuitive judgment: a critique of the economic approach to environmental regulation” (2008) 4(4) *International Journal of Law in Context* 291.

Martin Phillipson “Enforcement of environmental law: New Zealand's statutory model” (1995) 12(5) *Environmental and Planning Law Journal* 308.

Federico Picinali “The Denial of Procedural Safeguards in Trials for Regulatory Offences: A Justification” (2017) 11(4) *Criminal Law and Philosophy* 681.

Michael Pickford “The 'Environmental Bottom Line' and Economic Efficiency” (2014) 20 *Canterbury Law Review* 39.

A Mitchell Polinsky "Private versus Public Enforcement of Fines" (1980) 9(1) *The Journal of Legal Studies* 105.

A Mitchell Polinsky and Steven Shavell "The economic theory of public enforcement of law" (2000) 38(1) *Journal of Economic Literature* 45.

Richard Posner "An Economic Theory of the Criminal Law" (1985) 85(6) *Columbia Law Review* 1193.

Richard Posner "Social Norms and the Law: An Economic Approach" (1997) 87(2) *The American Economic Review* 365.

Brian Preston "Principled sentencing for environmental offences - Part 2: Sentencing considerations and options" (2007) 31 *Criminal Law Journal* 142.

Stephen Quinn "The unhappy marriage between RMA prosecutions and jury trials" (1998) 2(11) *Brookers Resource Management Bulletin* 123.

Peter Ramsay "The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State" (2006) 69(1) *Modern Law Review* 29.

Murray Rankin and Peter Finkle "The enforcement of environmental law: taking the environment seriously" (1983) 17 *University of British Columbia Law Review* 35.

Benjamin Richardson "Economic Instruments and Sustainable Management in New Zealand" (1998) 10(1) *Journal of Environmental Law* 21.

Genevra Richardson "Strict liability for regulatory crime: the empirical research" [1987] *Criminal Law Review* 295.

Julian Roberts "Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002" (2003) 36(3) *Australian & New Zealand Journal of Criminology* 249.

Paul Robinson "The criminal-civil distinction and the utility of desert" (1996) 76(1-2) *Boston University Law Review* 201.

Paul Robinson and John Darley "Does Criminal Law Deter? A Behavioural Science Investigation" (2004) 24(2) *Oxford Journal of Legal Studies* 173.

Jeremy Rowan-Robinson, Paul Watchman and Christine Barker "Crime and Regulation" (1988) *Criminal Law Review* 211.

Francis Sayre "Public Welfare Offenses" (1933) 33(1) *Columbia Law Review* 55.

John Scholz "Cooperation, Deterrence, and the Ecology of Regulatory Enforcement" (1984) 18(2) *Law & Society Review* 179.

John Scholz "Enforcement Policy and Corporate Misconduct: The Changing Perspective of Deterrence Theory" (1997) 60(3) *Law and Contemporary Problems* 253.



Colin Scott "Accountability in the Regulatory State" (2000) 27(1) *Journal of Law and Society* 38.

Neal Shover and Aaron Routhe "Environmental Crime" (2005) 32 *Crime and Justice* 321.

Jon Silberman "Does Environmental Deterrence Work? Evidence and Experience says Yes, But We Need to Understand How and Why" (2000) 30(7) *The Environmental Law Reporter* 10523.

Darren Sinclair "Self-Regulation Versus Command and Control? Beyond False Dichotomies" (1997) 19(4) *Law & Policy* 529.

Susan Smith "An iron fist in the velvet glove: redefining the role of criminal prosecution in creating an effective environmental enforcement system" (1995) 19(1) *Criminal Law Journal* 12.

J Spigelman "The rule of law and enforcement" (2003) 26(1) *University of New South Wales Law Journal* 200.

George Stigler "The Optimum Enforcement of Laws" (1970) 78(3) *Journal of Political Economy* 526.

William J Stuntz "The Pathological Politics of Criminal Law" (2001) 100(3) *Michigan Law Review* 505.

Victor Tadros "The Architecture of Criminalization" (2009) 28(1) *Criminal Justice Ethics* 74.

Dorothy Thornton, Neil Gunningham and Robert Kagan "General Deterrence and Corporate Environmental Behavior" (2005) 27(2) *Law & Policy* 262.

Steve Tombs "Crisis, What Crisis? Regulation and the Academic Orthodoxy" (2015) 54(1) *The Howard Journal of Criminal Justice* 57.

Steve Tombs and David Whyte "The Myths and Realities of Deterrence in Workplace Safety Regulation" (2013) 53(5) *The British Journal of Criminology* 746.

David Uhlmann "Environmental crime comes of age: the evolution of criminal enforcement in the environmental regulatory scheme" (2009) 2009(4) *Utah Law Review* 1223.

David Uhlmann "Prosecutorial discretion and environmental crime" (2014) 38(1) *Harvard Environmental Law Review* 159.

Ben Vanderkolk "A sub-category of strict liability?" [2005] *New Zealand Law Journal* 241.

Reece Walters and Diane Westerhuis "Green crime and the role of environmental courts" (2013) 59(3) *Crime, Law and Social Change* 279.

Robin White "Out of Court and Out of Sight: How Often are 'Alternatives to Prosecution' Used?" (2008) 12 *Edinburgh Law Review* 481.

Robin White “‘Decriminalisation’: A Pernicious Hypocrisy?” (2009) 13 *Edinburgh Law Review* 112.

Robin White “‘Civil penalties’: oxymoron, chimera and stealth sanction” (2010) 126 *Law Quarterly Review* 593.

Robin White “‘It’s not a criminal offence’-or is it? Thornton’s analysis of ‘penal provisions’ and the drafting of ‘civil penalties’” (2011) 32(1) *Statute Law Review* 17.

Rob White “Prosecution and sentencing in relation to environmental crime: Recent socio-legal developments” (2010) 53 *Crime, Law and Social Change* 365.

Rob White “Environmental crime and problem-solving courts” (2013) 59(3) *Crime, Law and Social Change* 267.

Rob White “Reparative justice, environmental crime and penalties for the powerful” (2017) 67(2) *Crime, Law and Social Change* 117.

Glanville Williams “The Definition of Crime” (1955) *Current Legal Problems* 107.

Søren Winter and Peter May “Motivation for Compliance with Environmental Regulations” (2001) 20(4) *Journal of Policy Analysis and Management* 675.

Karen Yeung “Quantifying regulatory penalties: Australian competition law penalties in perspective” (1999) 23(2) *Melbourne University Law Review* 440.

Richard Young and Andrew Sanders “The Ethics of Prosecution Lawyers” (2004) 7(2) *Legal Ethics* 190.

Lucia Zedner “Reparation and Retribution: Are They Reconcilable?” (1994) 57(2) *Modern Law Review* 228.

Franklin Zimring “The Multiple Middlegrounds between Civil and Criminal Law” (1992) 101(8) *The Yale Law Journal* 1901.

### *V Parliamentary Debates*

(2 December 1927) 216 NZPD at 732-733.

(5 December 1989) 503 NZPD 14168.

(5 December 1989) 503 NZPD 14174-14175.

(5 December 1989) 503 NZPD 14183.

(28 August 1990) 510 NZPD 3953.

(4 July 1991) 516 NZPD 3019.

(14 December 1995) 552 NZPD 410-411.

## *VI Central Government and Law Reform Materials*

### *A New Zealand*

Cabinet Office Circular “Cabinet Directions for the Conduct of Crown Legal Business 2016” (30 March 2016) CO (16)2.

Cabinet Paper *Reform of the Resource Management Act 1991: Phase One Proposals* (2009).

Cabinet Paper *Proposed Resource Management Amendment Bill: Stage 1 of a resource management system review* (2018).

Crown Law Office *Solicitor-General's Prosecution Guidelines* (2013).

Law Commission *Criminal Prosecution* (NZLC PP28, 1998).

Law Commission *Criminal Prosecution* (NZLC R66, 2000).

Law Commission *The Infringement System: A Framework for Reform* (NZLC SP16, 2005).

Law Commission *Sentencing Guidelines and Parole Reform* (NZLC R94, 2006).

Law Commission *Civil Pecuniary Penalties* (NZLC IP33, 2012).

Law Commission *Pecuniary Penalties: guidance for legislative design* (NZLC R133, 2014).

Law Commission *Reforming the Law of Contempt of Court: A Modern Statute* (NZLC R140, 2017).

Ministry for the Environment *Directions for change: A discussion paper* (August 1988).

Ministry for the Environment *People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform* (December 1988).

Ministry for the Environment *Resource Management Act Annual Survey of Local Authorities 1999/2000* (2001).

Ministry for the Environment *A study into the use of prosecutions under the Resource Management Act 1991: 1 October 1991 - 30 June 2001* (May 2002).

Ministry for the Environment *Resource Management Act: Two-yearly Survey of Local Authorities 2001/2002* (2003).

Ministry for the Environment *Resource Management Act: Two-yearly Survey of Local Authorities 2003/2004* (2005).

Ministry for the Environment *A study into the use of prosecutions under the Resource Management Act 1991: 1 July 2001 - 30 April 2005* (February 2006).

Ministry for the Environment *Resource Management Act: Two-yearly Survey of Local Authorities 2005/2006* (2007).

Ministry for the Environment *A study into the use of prosecutions under the Resource Management Act 1991: 1 May 2005 - 30 June 2008* (March 2009).

Ministry for the Environment *Resource Management Act: Two-yearly Survey of Local Authorities 2007/2008* (2009).

Ministry for the Environment *Resource Management Act: Survey of Local Authorities 2010/2011* (2011).

Ministry for the Environment *A study into the use of prosecutions under the Resource Management Act 1991: 1 July 2008 - 30 September 2012* (October 2013).

Ministry for the Environment *Resource Management Act: Survey of Local Authorities 2012/2013* (2014).

Ministry for the Environment *Compliance, monitoring and enforcement by local authorities under the Resource Management Act 1991* (2016).

Ministry for the Environment *National Monitoring System for 2014/15* (2016).

Ministry for the Environment *National Monitoring System - information requirements: Guidance for the 2016/17 financial year* (2016).

Ministry for the Environment *National Monitoring System for 2015/16* (2017).

Ministry for the Environment *Draft Best Practice Guidelines for Compliance, Monitoring and Enforcement under the Resource Management Act 1991* (2018).

Ministry for the Environment *Best Practice Guidelines for Compliance, Monitoring and Enforcement under the Resource Management Act 1991* (2018).

Ministry for the Environment *National Monitoring System for 2016/17* (2018).

Ministry for the Environment *National Monitoring System - information requirements: Guidance for the 2018/19 financial year* (2018).

Ministry for the Environment *National Monitoring System for 2017/18* (2019).

Ministry for the Environment *National Planning Standards* (2019).

Ministry for the Environment and Stats NZ *New Zealand's Environmental Reporting Series: Environment Aotearoa 2019 Summary* (2019).

Ministry of Business Innovation & Employment *Small Businesses in New Zealand* (June 2017).

New Zealand Review Group on the Resource Management Bill *Discussion Paper on the Resource Management Bill Prepared by the Review Group* (1990).

*Report of the Review Group on the Resource Management Bill* (11 February 1991).

Resource Management Law Reform Core Group *Analysis of Existing Statutes: Departmental Views* (Ministry for the Environment, Working Paper 2, July 1988).

Resource Management Law Reform Core Group *Analysis of Existing Statutes: Legal Analysis Part 1: Town and Country Planning Legislation and Procedures* (Ministry for the Environment, Working Paper 7, July 1988).

Resource Management Law Reform Core Group *Analysis of Existing Statutes: Legal Analysis Part 3: Water and Soil Conservation Act 1967, Soil Conservation & Rivers Control Act 1941* (Ministry for the Environment, Working Paper 7, July 1988).

Resource Management Law Reform Core Group *Analysis of Existing Statutes: Legal Analysis Part 4: Clean Air Act 1972* (Ministry for the Environment, Working Paper 7, 1988).

Resource Management Law Reform Core Group *Report on Phase 1: For consideration by Ministerial Committee on reform of Local Government and Resource Management* (6 July 1988).

Resource Management Law Reform Core Group *Resource Management Disputes: Part A: The Role of Courts and Tribunals; Part B: Mediation* (Ministry for the Environment, Working Paper 22, November 1988).

Resource Management Law Reform Core Group *Enforcement and Compliance Issues in Resource Management* (Ministry for the Environment, Working Paper 30, November 1988).

Resource Management Law Reform Core Group *Public Submissions on "People, Environment, and Decision Making"* (Ministry for the Environment, Working Paper 32, April 1989).

Resource Management Review Panel *Transforming the resource management system: Opportunities for change* (November 2019).

### *B Australia*

Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC R95, 2002).

### *C Canada*

John Swaigen and Gail Bunt *Sentencing in Environmental Cases* (Law Reform Commission of Canada, Ottawa, 1985).

### *D United Kingdom*

Cabinet Office (UK) *Regulatory Justice: Sanctioning in a post-Hampton World* (2006).

Philip Hampton *Reducing administrative burdens: effective inspection and enforcement* (HM Treasury (UK), March 2005).

Richard Macrory *Regulatory Justice: Making Sanctions Effective* (2006).

The United Kingdom Law Commission *Criminal Liability in Regulatory Contexts* (CP195, 2010).

### *VII Local Government Materials*

Bay of Plenty Regional Council *2016/2017 Regulatory Compliance Report* (2017).

Environment Canterbury *Compliance Monitoring and Enforcement Guidelines 2010* (2010).

Environment Canterbury *Guidelines for implementing Alternative Environmental Justice* (2012).

Environment Southland *Compliance Policies* (2017).

Environment Southland *Environmental Compliance Monitoring Report 2016/17* (2017).

Gisborne District Council *2015/16 Annual Report* (2016).

Local Government New Zealand *RMA Sector Position Paper: Draft for feedback* (2015).

Marlborough District Council *Annual Report* (2014/15).

Marlborough District Council *Minutes of a Meeting of the Environment Committee* (3 September 2015).

Marlborough District Council *Enforcement Policy* (2018).

Taranaki Regional Council *Enforcement Provisions and Procedure under Resource Management Act* (2017).

Waikato Regional Council *Basic Investigative Skills for Local Government* (2016).

Waikato Regional Council *Enforcement Policy* (2016).

Waikato Regional Council *2016/17 Annual Report* (2017).

West Coast Regional Council *Enforcement Policy* (2013).

West Coast Regional Council *Minutes of the Meeting of the Resource Management Committee* (10 October 2017).

### *VIII Official Information Requests*

Environment Southland Email to Mark Wright regarding Local Government Official Information and Meetings Act Request (13 November 2018).

Environment Southland Email to Mark Wright regarding LGOIMA request (13 December 2018).

Ministry of Justice Letter to Mark Wright regarding Official Information Act 1982 request (23 February 2018).

Ministry of Justice Letter to Mark Wright regarding Official Information Act 1982 request (clarification) (19 March 2018).

Otago Regional Council Letter to Mark Wright regarding Local Government Official Information and Meetings Act 1987 (LGOIMA) Request (24 June 2019).

Otago Regional Council Email to Mark Wright regarding Local Government Official Information and Meetings Act 1987 (LGOIMA) Request (5 September 2019).

### *IX Reports and Papers*

Warren Adler *The state of the compliance and enforcement regime under the Resource Management Act 1991* (Strategik Group, 2008).

Samantha Bricknell *Environmental crime in Australia* (Australian Institute of Criminology, 2010).

Marie Brown *Last Line of Defence: Compliance, monitoring and enforcement of New Zealand's environmental law* (Environmental Defence Society, Auckland, 2017).

Marie Brown *Independent Analysis of the 2017/2018 Compliance Monitoring and Enforcement Metrics for the Regional Sector* (The Catalyst Group, 2018).

District Court of New Zealand *Annual Report* (2017).

Environment Court of New Zealand *Annual Review Calendar Year 2015* (2015).

Environment Court of New Zealand *Annual Review Calendar Year 2016* (2016).

Environment Court of New Zealand *Annual Review Calendar Year 2017* (2017).

Forest & Bird *Cleaning Up: Fixing compliance, monitoring and enforcement in the dairy sector* (August 2018).

Robert Fowler *Review of Oriwa Crescent prosecutions* (Kapiti Coast District Council, August 2014).

Greenstreet Berman Ltd report for Defra & Environment Agency (UK) *Business perspectives on securing compliance* (2011).

Allan Hawke *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (October 2009).

Antony Hearn *Review of the Town & Country Planning Act 1977* (Department of Trade and Industry, 1987).

KW Lidstone, Russell Hogg and Frank Sutcliffe *Prosecutions by private individuals and non-police agencies* (Royal Commission on Criminal Procedure (UK), No 10, 1980).

New Zealand Productivity Commission *Towards better local regulation* (May 2013).

New Zealand Productivity Commission *Regulatory institutions and practices* (June 2014).

New Zealand Productivity Commission *A history of town planning: Research note* (2015).

New Zealand Productivity Commission *Better urban planning: Final report* (2017).

Office of the Auditor-General *Managing freshwater quality: Challenges for regional councils* (September 2011).

Office of the Auditor-General *Managing freshwater quality: Challenges and opportunities* (September 2019).

Organisation for Economic Co-operation and Development *Reducing the risk of policy failure: challenges for regulatory compliance* (2000).

Organisation for Economic Co-operation and Development *Risk and Regulatory Policy: Improving the Governance of Risk* (OECD Reviews of Regulatory Reform, 9 April 2010).

Organisation for Economic Co-operation and Development *Regulatory Enforcement and Inspections* (OECD Best Practice Principles for Regulatory Policy, May 2014).

Registrar of the Environment Court *Report of the Registrar of the Environment Court for the 12 months ended 30 June 2017* (2017).

Colin Scott *Regulatory Crime: History, Functions, Problems, Solutions* (University College Dublin, UCD Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper No. 13/2009, 2009).

Greg Severinsen and Raewyn Peart *Reform of the Resource Management System - The Next Generation - Synthesis Report* (Environmental Defence Society, 2018).

Worksafe New Zealand *Annual Report 2016-2017* (2017).

Madeleine Wright, Sally Gepp and David Hall *A Review of the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017* (Environmental Defence Society Inc and Royal New Zealand Forest & Bird Protection Society of New Zealand, 2019).

## *X Speeches*

Sian Elias, Chief Justice of New Zealand “Managing Criminal Justice” (address given at the Criminal Bar Association Conference, Auckland, 5 August 2017).

Geoffrey Palmer “The Resource Management Act - How we got it and what changes are being made to it” (address to the Resource Management Law Association, New Plymouth, 27 September 2013).



Mahla Pearlman, Chief Judge of the Land and Environment Court of New South Wales “The Land and Environment Court of New South Wales” (address to the Royal Australian Planning Institute Congress, Sydney, 5 October 2000).

Ronald Young “Has New Zealand's criminal justice system been compromised?” (Harkness Henry Lecture, Waikato University, Hamilton, 7 September 2016).

### *XI Newspaper Articles and Press Releases*

Joanne Carroll “Mining company avoids court with six figure slip settlement” *Stuff* (online ed, Wellington, 31 October 2018).

Jennifer Eder “Marlborough winery contaminates neighbours' drinking water with grape waste” *Stuff* (online ed, Wellington, 16 December 2018).

Environment Southland “Public statement: 2015 Oil spill response” (press release, 14 July 2017).

Farah Hancock “RMA oversight unit 'not fit for purpose’” *Newsroom* (online ed, Wellington, 19 November 2019).

Evan Harding “Environment Southland faces blowtorch over declining freshwater quality” *Stuff* (online ed, Wellington, 21 May 2017).

Evan Harding “Environment Southland didn't tell public of 23,700-litre oil spill” *Stuff* (online ed, Wellington, 10 July 2017).

Hawkes Bay Regional Council and Hastings District Council “HBRC agrees to withdraw prosecution of HDC” (press release, 12 December 2016).

Local Government New Zealand “Independent report on regional council compliance, monitoring and enforcement” (press release, 30 May 2019).

Shawn McAvinue “Oil spills after truck rolls in Southland” *Otago Daily Times* (online ed, Dunedin, 30 October 2015).

Liz McDonald “Canterbury coalmine fined after runoff endangers fish habitat” *Stuff* (online ed, Wellington, 20 November 2017).

Hon David Parker MP “Resource Management Act oversight unit to be established” (press release, 17 May 2018).

Hon David Parker MP “Two-step RMA reform to start by fixing the previous government's blunders” (press release, 9 November 2018).

Hon David Parker MP “Comprehensive overhaul of the RMA” (press release, 24 July 2019).

Gerald Piddock “Council to seek court orders to force non-complying farmers to improve effluent storage” *Stuff* (online ed, Wellington, 14 December 2018).

“RMA reforms back on track after National makes agreement with Maori Party” *New Zealand Herald* (online ed, Auckland, 23 March 2017).

Matt Shand “\$1700 an hour community work suggested by Tauranga polluter for serious breaches” *Stuff* (online ed, Wellington, 13 March 2018).

Marty Sharpe “Charges against Hastings District Council after Havelock North gastro investigation” *Stuff* (online ed, Wellington, 18 November 2016).

Marty Sharpe “Canned prosecution cost Hastings ratepayers \$271,000” *Stuff* (online ed, Wellington, 26 January 2017).

Marty Sharpe “Councils issue nearly twice as many pollution notices - and worst dairy farms are still to pay fines” *Sunday Star-Times* (online ed, Wellington, 17 September 2017).

Marty Sharpe “Fine of \$225,000 for dirty dairying will go unpaid because companies are broke” *Stuff* (online ed, Wellington, 15 May 2018).

Elton Smallman “High-risk farms the focus as aerial monitoring looks to make a return” *Stuff* (online ed, Wellington, 25 June 2018).

Michael Wright “Bathurst Resources fined \$10,000 for environmental breaches at Canterbury mine” *Stuff* (online ed, Wellington, 23 January 2018).

## *XII Other Resources*

AMI Insurance *Farm Insurance Policy Wording*.

Bathurst Resources Limited *Annual Report* (2017).

Bay of Plenty Regional Council “*Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd* - Agreed Summary of Facts” (2016) Bay of Plenty Regional Council.

Compliance and Enforcement Special Interest Group *Regional Sector Strategic Compliance Framework 2016-2018*.

Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2014).

NZ Police *Police Adult Diversion Scheme* (2013).

Quality Planning *RMA Enforcement Manual* (2013).

Standards New Zealand *Achieving Compliance: A Guide for Compliance Agencies in New Zealand* (June 2011).